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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~ 1913

No. ~~1095~~. 538

CITY OF LOUISVILLE, APPELLANT,

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED MAY 3, 1913.

(23,670).

(23,670)

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1 *Petition for Appeal.*

In the District Court of the United States for the Western District of Kentucky.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Petition by Defendant for Appeal to the Supreme Court of the United States.

To the Honorable the United States District Court for the Western District of Kentucky:

The above named defendant, City of Louisville, Kentucky, feeling itself aggrieved by the order and decree made and entered in this cause on the 10th day of March, A. D. 1913, and that there is error to the prejudice of said defendant in the said order and decree by which it will be irreparably injured, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith; and it prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, may be sent to the Supreme Court of the United States at Washington, D. C., and your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

PENDLETON BECKLEY.
J. W. S. CLEMENTS.
STUART CHEVALIER,
Solicitors for Defendant.

2 *Transcript of Record.*

Proceedings of the District Court of the United States for the Western District of Kentucky at a Regular Term Begun and Held at the Federal Court Hall, in the City of Louisville, on Monday, March 11th, 1912.

Present, Honorable Walter Evans, Judge of the District Court of United States for the Western District of Kentucky.

No. 7194.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Be it remembered, That heretofore, to-wit, on the 28th day of September, 1912, the following order was entered in the above entitled cause.

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Order.

This day came the complainant by A. P. Humphrey, its counsel. Came also the defendant by C. B. Blakey and Huston Quin, its counsel, and filed a notice, duly accepted by Humphrey & Humphrey, counsel for complainant.

Thereupon the defendant by its said counsel filed a mandate of the Supreme Court of the United States herein, the mandatory part whereof is as follows:

"On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, without prejudice; and that the said defendant, City of Louisville, recover against the said complainant Three thousand nine hundred and forty-five dollars and sixty-five cents, for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Kentucky for further proceedings not inconsistent with the opinion of this Court."

And, pursuant thereto, it is ordered, adjudged and decreed by this Court that the decree entered by the Circuit Court of the United States for the Western District of Kentucky on the 25th day of April, A. D. 1911, in this cause be, and the same is hereby, set aside; and that the cause be, and it is, restored to the docket of this court for further proceedings not inconsistent with the said opinion of the Supreme Court.

Comes the defendant and moves the Court to enter an order in the above styled cause nunc pro tunc as of July 9, 1909, correcting and amending the order and memorandum of proceedings of this Court as of said date as follows:

Strike out the words "and the Court not being sufficiently advised thereof takes time", and insert in lieu thereof the following words: "And counsel for complainant, by his statement and agreement made in judicio having bound his client to promptly repay to the subscribers to its Louisville service all sums collected from them in excess of the rates fixed in the rate ordinance of March 6th, 1909, should said rate ordinance be found not to be confiscatory, and it appearing that the respondent is a twenty-six-million-dollar corporation and highly prosperous, and it being competent for the Court in its final decree to direct the complainant to make restitution of any sums so exacted should the rate ordinance be finally declared valid, the Court in view of the record and the considerations mentioned, will decline to make an order at this time modifying the restraining order or requiring the complainant to pay such excessive collections into court or to give bond for the restitution thereof, but will, on the final hearing, require the complainant to make restitution should the rights of the parties and the principles of equity require it."

Defendant further moves the Court for an order requiring com-

plainant to pay into the registry of this court within such time as the Court may fix, all amounts received by it on account of payments for telephone service from subscribers in the City of Louisville in excess of the rates fixed by the ordinance of March 6, 1909, and for an order appointing a Special Master to take proof and report to the Court the amount, with interest, so collected by complainant from the subscribers to its Louisville service in excess of the rates fixed in said ordinance, and that upon the coming in of the report of the Master a decree be entered ordering the complainant to pay into court all sums so collected by it.

In support of the above motion defendant asks leave to file the affidavits of C. B. Blakey, Huston Quin and Bruce Haddeman.

And defendant finally moves the Court to retain this action
5 on the docket until all matters connected with the restitution herein sought are finally disposed of.

Comes A. Engelhard & Sons Company by its counsel, C. B. Blakey, and moves the Court for leave in this cause to file its bill of intervention tendered herewith on behalf of itself and all other persons who have paid to the complainant for telephone service in the City of Louisville since March 6, 1909, sums in excess of the legal rates and wherein it seeks to have the complainant make restitution of the overcharges collected by it from its subscribers for telephone service in Louisville.

6 The notices referred to in the above order are as follows:

Notice.

The complainant, Cumberland Telephone & Telegraph Company, will take notice that the defendant by its counsel will on Saturday, the 28th day of September, 1912, at about ten o'clock, A. M., tender in Court the mandate of the Supreme Court of the United States in the above styled cause and move the Court for an order setting aside the judgment entered herein on April 25, 1911, and will further move the Court to enter an order nunc pro tunc as of July 9, 1909, correcting and amending the order and the proceedings of the Court on said date, and will further move the Court for an order requiring the complainant to make restitution to those of its Louisville subscribers from whom it has collected since March 6, 1909, rates for telephone service in excess of the rates fixed in the ordinance of March 6, 1909, and will further move the Court for an order appointing a special master to examine the books and records of the complainant and ascertain and report the amount of the excessive charges so collected by the complainant from its said subscribers.

C. B. BLAKEY,
HUSTON QUIN,
Counsel for Defendant, City of Louisville.

Service acknowledged Sept. 27, 1912.
HUMPHREY & HUMPHREY.

7 *Notice.*

Complainant, Cumberland Telephone & Telegraph Company, will take notice that A. Englehard & Sons Company by its counsel, C. B. Blakey, will on the 28th day of September, 1912, at about ten o'clock, A. M., move the Court in the above styled cause for leave to file therein its bill of intervention on behalf of itself and all other subscribers to the service of the Cumberland Telephone & Telegraph Company in Louisville, Kentucky, who paid to complainant between March 6, 1909, and July 1, 1912, sums in excess of the rates fixed in the ordinance of March 6, 1909, and wherein it will seek to have the complainant make restitution of the said amounts so collected by the complainant in excess of the legal rates.

C. B. BLAKEY,
Solicitor for A. Englehard & Sons Company.

Service acknowledged Sept. 27, 1912.
HUMPHREY & HUMPHREY.

8 The mandate above referred to is as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Western District of Kentucky, Greeting:

Whereas, lately in the Circuit Court of the United States for the Western District of Kentucky, in a cause between Cumberland Telephone & Telegraph Company, complainant, and City of Louisville, defendant, No. 7194, wherein the decree of the said Circuit Court entered in said cause on the 25th day of April, A. D. 1911, is in the following words, viz:

"This cause having been heretofore submitted upon the Master's report and exceptions thereto, and also in chief, and having been argued by counsel, and the Court being sufficiently advised, delivered a written opinion which is now filed and ordered to be made a part of the record.

In consideration whereof it is now ordered, adjudged and decreed as follows:

1. That the exceptions of the complainant to the Master's report be, and they are hereby, sustained only to the extent wherein the Court, by its opinion, shows that it differs from the conclusions of the Master. All other of complainant's exceptions are overruled, except those relating to the Master's finding as to the cost of the plant. These exceptions having been ignored by the Court and not passed upon for the reasons stated in the Opinion herein filed.

2. That all the exceptions filed by the defendant be, and they are hereby, overruled.

3. That the ordinance adopted by the City of Louisville on February 27, 1909, through its legislative department, and approved by the Mayor on March 6, 1909, being an ordinance entitled "An ordinance fixing the maximum rate to be charged for telephone

service in the City of Louisville," is, as to the complainant, confiscatory, null and void, and violates the Fourteenth Amendment of the Constitution of the United States in, that it would, if enforced, deprive the complainant of its property without due process of law.

9 It is therefore further ordered, adjudged and decreed by the Court that the prayer of the complainant's bill be, and the same is, sustained; and the defendant, the City of Louisville, its officers, agents, employés and all other persons, are hereby perpetually enjoined from undertaking to enforce in any wise the provisions of said ordinance against the complainant.

4. That the complainant recover of the defendant the costs of this cause, including the compensation heretofore allowed by the Court to the Special Commissioner and paid by the complainant."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel:

"On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, without prejudice; and that the said defendant, City of Louisville, recover against the said complainant Three thousand nine hundred and forty-five dollars and sixty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Kentucky for further proceedings not inconsistent with the opinion of this Court."

June 7, 1912.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the third day of August, in the year of our Lord one thousand nine hundred and twelve.

10 *Costs of Defendant.*

Clerk	$1,455.15
Printing Record	2,470.50
Attorney	20.00
	$3,945.65

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

11 The motion of the defendant referred to in the above order is as follows:

Comes the defendant and moves the Court to enter an order in the above styled cause nunc pro tunc as of July 9, 1909, correcting and amending the order and memorandum of proceedings of this Court as of aside date as follows: Strike out the words "and the Court not being sufficiently advised thereof takes time" and insert in lieu thereof the following words:

and counsel for complainant, by his statement and agreement made in judicio having bound his client to promptly re-pay to the subscribers to its Louisville service all sums collected from them in excess of the rates fixed in the rate ordinance of March 6, 1909, should said rate ordinance be found not to be confiscatory, and it appearing that the respondent is a twenty-six million dollar corporation and highly prosperous and it being competent for the Court in its final decree to direct the complainant to make restitution of any sums so exacted should the rate ordinance be finally declared valid, the Court in view of the record and the considerations mentioned will decline to make an order at this time modifying the restraining order or requiring the complainant to pay such excessive collections into Court or to give a bond for the restitution thereof, but will on the final hearing require the complainant to make restitution should the rights of the parties and the principles of equity require it.

Defendant further moves the Court for an order requiring complainant to pay into the registry of this Court within such time as the Court may fix all amounts received by it on account of
12 payments for telephone service from subscribers in the City of Louisville in excess of the rates fixed by the ordinance of March 6, 1909, and for an order appointing a special master to take proof and report to the Court the amount with interest so collected by complainant from the subscribers to its Louisville service in excess of the rates fixed in said ordinance, and that upon the coming in of the report of the Master a decree be entered ordering the complainant to pay into Court all sums so collected by it.

In support of the above motion defendant asks leave to file the affidavits of C. B. Blakey, Huston Quin and Bruce Haldeman.

And defendant finally moves the Court to retain this action on the docket until all matters connected with the restitution herein sought are finally disposed of.

C. B. BLAKEY,
HUSTON QUIN,
Counsel for Defendant, City of Louisville.

13 The Affidavit of C. B. Blakey above referred to is as follows:

Affidavit of C. B. Blakey.

The affiant, C. B. Blakey, says that he is the City Attorney of the City of Louisville, and has represented the City of Louisville as its counsel in all matters relating to the above styled cause.

He says that the records in the above styled cause show that the bill of complaint was filed herein on the 8th day of March, 1909, and that on the same date a restraining order was issued out of this Court, without notice to defendant and without bond being required of complainant, enjoining and restraining the said City of Louisville and all other persons from in any manner enforcing the provisions of the rate ordinance passed by the City of Louisville on the 6th day of March, 1909; that by the terms of the said restraining order it was to remain in force until March 29, 1909, and until further order of Court.

Affiant says that on the 29th day of March a motion for preliminary injunction pendente lite was made by complainant, and said motion was on March 31st duly argued and submitted; that on June 15, 1909, no action having been taken on the motion for a preliminary injunction, defendant moved the Court for an order dissolving the restraining order which had been issued on March 8, 1909, which motion was on June 29, 1909, overruled; that on June 22, 1909, A. Engelhard & Sons Company, by its counsel, W. O. Harris, moved the Court for permission to file a bill of intervention herein, and thereby sought to have said restraining order modified, which motion was on June 29, 1909, overruled.

Affiant says thereafter, to-wit, on June 30, 1909, the defendant, through its counsel, without waiving its objection to the re-
14 straining order remaining in force, and solely because said restraining order was allowed to remain in force, moved the Court to modify said restraining order and to require the complainant to pay into Court and impound all sums received by it, or thereafter to be collected from the subscribers to its telephone system in the City of Louisville in excess of the rates established by the ordinance, the same to be held by some one to be appointed by this Court until the further order of the Court.

Affiant says that said motion was set for hearing on July 9, 1909; that on said date said cause came on for hearing upon the defendant's motion of June 30th, above referred to, whereupon the complainant appeared in court through its counsel, Fairleigh, Straus & Fairleigh, who, for said complainant, objected to the granting of said motion, and filed in support of said objection the affidavit of H. Blair Smith, the Auditor of the complainant company; that the only objection raised by said counsel for complainant to the granting of said motion was, that it would confuse the bookkeeping accounts of complainant and would result in the complainant's losing interest on the money so paid into court. Affiant says that David W. Fairleigh, Esq., the member of the firm of Fairleigh, Straus & Fairleigh, who was in active charge of complainant's interest, and who appeared on said date for the com-

plainant, stated and agreed in judicio that if the Court would not make such an order and would not modify the restraining order as sought by defendant, then, in that event, the complainant would agree to keep an accurate account and record of all sums collected from its Louisville subscribers in excess of the rates fixed by the ordinance of March 6, 1909, and would further agree and guarantee to refund and repay to each and every subscriber to the service of complainant company in Louisville any amount which such subscriber might pay to said complainant in excess of the rates fixed by the ordinance of March 6, 1909, provided said ordinance was finally enforced by the courts. Affiant says that said David W. Fairleigh, Esq., as counsel for complainant, further stated that if the Court saw fit to so order, the complainant was willing to execute a bond conditioned on the faithful carrying out of the agreement made by him in judicio, as above detailed. Affiant says
15 that the presiding Judge of this court thereupon stated in open court, in substance, that the bill of complaint and the affidavits filed in the case showed that the complainant was a corporation with $26,000,000 of assets; that, according to the Bill only $33,000,00 would be collected each year in excess of the rates fixed by the ordinance; that the Court had ample power to require, and would require, the complainant to refund any sums that it might collect in excess of the rates fixed by the ordinance of March 6, 1909, in case said ordinance was finally enforced, and the Court then declared, in substance, that in view of the foregoing facts, and in view of the statement made by counsel for complainant, and above referred to, he would not at that time modify said restraining order nor direct the entering of an order requiring the complainant to pay into court said excess, or give a bond therefor. That thereupon court adjourned and no further action was ever taken upon the said motion; that, due to a mispression of the Clerk, or an oversight on the part of the Court, no record was made of the action taken by the Court on said motion, nor was any record made of the statement and agreement made by counsel in judicio, as above detailed; that by a mispression of the Clerk the proceedings of the court respecting said motion show that on July 9, 1909, the said motion was argued by counsel "and the Court not being sufficiently advised thereupon takes time." Affiant says that said record so made by the Clerk respecting the action taken on said motion is not correct and does not state the facts, but that the facts as they occurred are as detailed above.

Affiant says that he learned only recently, to-wit, since June 7, 1912, of the error in the records as above shown, and of the fact that the proceedings of the court in the above styled action on July 9, 1909, did not show the facts as detailed in this affidavit.

Affiant says that he does not know how much has been collected by the complainant from its subscribers in the City of Louisville in excess of the legal rate, but affiant says that the complainant charged in its bill that the excess collections would amount to about $33,000,00 per year, or $99,000,00 during the period said
16 complainant disregarded the said rate ordinance; that at the time the rate ordinance was passed the complainant had

over 9500 subscribers; that during the year 1908 complainant lost 2676 subscribers and gained 1565 subscribers in the city, and that if the same proportion of losses and gains were maintained during the years 1909, 1910, 1911 and 1912, then the complainant had, during the time it disregarded said rate ordinance, at least fourteen thousand subscribers; that some of said subscribers are not entitled to a refund, but that the great majority of them have paid to the complainant sums in excess of the rates fixed in the ordinance, all of which sums have been paid under compulsion, and that all of the subscribers so paying said sums are entitled to have same refunded; that many of the payments made to the complainant in excess of the amount fixed in the rate ordinance are small, not exceeding $5.00 or $10.00; that the parties paying small amounts cannot afford to institute legal proceedings to collect the amounts so paid by them to the complainant; that probably the largest overcharge paid by any subscriber to the complainant during the entire period is $72.00; that unless this Court orders complainant to re-pay the excess amounts so collected by it, the result will not only cause a multiplicity of suits, but will also cause a loss of many thousands of dollars to the small users of telephone service who cannot afford to prosecute their claims against the complainant.

Affiant says that, in his opinion, it will require the services of a Master to examine the books and records of the complainant and determine therefrom the names and addresses of the parties to whom the complainant should re-pay sums collected by it in excess of the legal rates.

And further affiant sayeth not.

C. B. BLAKEY.

Subscribed and sworn to before me by said C. B. Blakey this 27 day of September, 1912. My commission expires January 22, 1916.

WM. J. O'CONNOR,
Notary Public, Jefferson County, Kentucky.

17 The Affidavit of Huston Quinn above referred to is as follows:

Affidavit of Huston Quinn.

The affiant, Huston Quin, states that as Assistant City Attorney of the City of Louisville, he was associated with Mr. C. B. Blakey, City Attorney, in the trial of the various proceedings incident to the above styled action and that he is familiar with the proceedings and the entire record of said cause. Affiant states that he has read the affidavit of Mr. C. B. Blakey, and that the statements contained in said affidavit accord with the recollection of this affiant and that the statements contained in said affidavit are true to the best of this affiant's knowledge and belief.

HUSTON QUIN.

Subscribed and sworn to before me by Huston Quin, this 27th day of September 1912. My commission expires Jany. 22, 1916.

WM. J. O'CONNOR,
Notary Public, Jefferson County, Kentucky.

18 The Affidavit of Bruce Haldeman above referred to is as follows:

Affidavit of Bruce Haldeman.

Bruce Haldeman says that he is President of The Louisville Times Company; that said Louisville Times Company now publishes and has for more than twenty-seven years published a daily newspaper in the City of Louisville known as The Louisville Times; that the said Louisville Times Company employs reporters to gather the current daily news of the City and to report the proceedings of the various Courts holding sessions in the City of Louisville, and among others the United States Circuit Court for the Western District of Kentucky; that during the months of June and July, 1909, the News Department of The Louisville Times Company employed one Wm. R. Scott, a reputable and experienced newspaper reporter, to report for publication the proceedings of the United States Circuit Court for the Western District of Kentucky; that on July 9, 1909, the said Wm. R. Scott furnished the News Department of The Louisville Times Company with what purported to be a report of the proceedings of the United States Circuit Court for the Western District of Kentucky in the case of the Cumberland Telephone & Telegraph Company vs. City of Louisville, then pending in said Court; that said account so furnished by said Wm. R. Scott was published in The Louisville Times on page 1, column 7 thereof, on Friday, July 9, 1909, and is as follows:

19 "Agrees to Refund Excess Money.

Cumberland Company Says It Will Pay Subscribers if Decision is Adverse.

Rebate in Store if Ordinance Passed by Council is Held to Be Valid.

"The Cumberland Telephone & Telegraph Company today filed a demurrer in the Federal Court before Judge Walter Evans to the petition recently made by the City of Louisville, asking that, in case the new rate ordinance passed by the City Council and now before Judge Evans for judgment be upheld, all money paid to the said telephone company by the subscribers in excess of the rate allowed by the new ordinance to be refunded.

"The original petition was added to by the City before the demurrer was filed. Decisions in parallel cases in other cities were quoted where the Court had ruled that, pending judgment upon the question of validity of the rate ordinance, all money in excess of the rate ordinance be put on deposit in bank.

"The demurrer offered by the telephone company to this proposition contained a statement as to the effect such a procedure would have upon the finances of the company, and was followed by an offer upon the company's part to bind itself to pay, in case the ruling of the Court went against them, all money in excess of the new ordinance to all subscribers upon demand, and that such settlement would be ready to be met immediately upon the decision of the Court."

Affiant says that since July 9, 1909, all of the copies of The Louisville Times of said date known to this affiant have been destroyed save one copy now on file in The Louisville Free Public Library, and that no copy of said Louisville Times of July 9, 1909, can be had for filing with this affidavit.

And further affiant sayeth not.

BRUCE HALDEMAN.

Subscribed and sworn to before me by said Bruce Haldeman this 27th day of September, 1912. My commission expires January 22, 1916.

FRANK B. STOEFFER,
Notary Public, Jefferson County, Kentucky.

20 The motion of A. Engelhard & Sons Company above referred to is as follows:

Motion.

Comes A. Englehard & Sons Company by its counsel, C. B. Blakey, and moves this Honorable Court for leave to file in this cause its bill of intervention tendered herewith on behalf of itself and all other persons who have paid to the complainant for telephone service in the City of Louisville since March 6, 1909, sums in excess of the legal rates, and wherein it seeks to have the complainant make restitution of the overcharges collected by it from its subscribers for telephone service in Louisville.

C. B. BLAKEY,
Solicitor for A. Englehard & Sons Company.

21 The Bill of Intervention of A. Engelhard & Sons Company above referred to is as follows:

Bill of Intervention of A. Englehard & Sons Company.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky:

Your intervenor, A. Englehard & Sons Company, on behalf of itself and all other subscribers to the Cumberland Telephone & Telegraph Company's service who have paid to said company since March 6, 1909, for telephone service sums in excess of the legal

rate which said Cumberland Telephone & Telegraph Company was authorized to charge for its service, comes and by leave of Court files this, its bill of intervention, in the above entitled cause, and states:

First. That your intervenor, A. Englehard & Sons Company, is a corporation duly incorporated and existing under and by virtue of the laws of the State of Kentucky, and having its principal place of business in the City of Louisville, Jefferson County, Kentucky.

Second. That your intervenor on the 22nd day of June, 1909, tendered and sought to have filed a bill of intervention in the above styled cause, wherein it sought to have this Court modify the restraining order granted in the cause and eliminate from its provisions this intervenor and all other Louisville subscribers to the telephone service of the complainant; that the object of your intervenor in seeking to have said restraining order so modified was in order that it and the other subscribers to the complainant's service might avoid paying to the complainant for telephone service
22 a rate in excess of that fixed by the ordinance of March 6, 1909; that, as shown by the record in the above styled cause, the said bill of intervention was not allowed to be filed, but said bill of intervention so tendered is among the papers with this cause and your intervenor now asks leave to have said tendered bill of intervention made and read as a part of this bill of intervention.

Third. Your intervenor says that it is and has been since March 6, 1909, a subscriber to the telephone service of the complainant; that it has been paying for the use of said telephone the sum of $5.00 per month during all of the time between March 6, 1909, and July 1, 1912, which said sum is subject to a discount of fifty cents per month for prompt payment, or a net sum in favor of said complainant of $4.50 per month; that your intervenor has what is known and designated as a business party line service unlimited, and that by and under the terms of the ordinance of March 6, 1909, the rate for said service is limited to $4.00 per month, and that said complainant was at no time subsequent to March 6, 1909, authorized to charge or collect a greater rate than $4.00 per month for said service; that had your intervenor at any time between March 6, 1909, and July 1, 1912, refused to pay the rate charged by the complainant for said telephone service, said complainant would have taken from this intervenor's place of business the telephone there installed and would thereby have deprived it of the use of said telephone service.

Fourth. Your intervenor further says that it is informed and believes, and charges the fact to be, that during the pendency of this litigation, to-wit, on July 9, 1909, the Judge of this court refrained from modifying the temporary restraining order granted in this cause and refrained from requiring the complainant to pay into court the charges made by it for telephone service in excess of the rates fixed by the ordinance of March 6, 1909, and refrained from requiring the complainant to give a bond to restore said excess payments solely for the reason and because of the fact that the complainant through its counsel stated and agreed in judicio
23 that if the Court would not make any such order, then in that event the complainant would guarantee to refund and

repay to each and every subscriber to its service in the City of Louisville all amounts which such subscribers might pay to said complainant in excess of the rates fixed by the ordinance of March 6, 1909, provided said ordinance was finally enforced; and to this end would keep an account of the amounts so collected; and your intervenor says that it is informed and believes, and charges the fact to be true, that the said complainant through its counsel did make such a statement and agreement in judicio as that above detailed, and your intervenor charges that the stipulation in judicio hereinbefore referred to, made by complainant, and in consideration of which an order requiring the complainant to pay into court, or to give bond for restitution of the charges made by it for telephone service in excess of the rate fixed by the ordinance of March 6, 1909, was withheld by the Court, constituted a pledge that the complainant would promptly repay all such collections in excess of the legal rates in the event the said ordinance should be finally declared valid; that the collection of rates for telephone service in excess of the rates fixed by the ordinance of March 6th, 1909, was an illegal exaction of money, and that the money so unlawfully exacted and received by the complainant is not the property of the complainant, but is the property of those paying such excessive rates and the amount thereof constitutes a trust fund which should be paid into the registry of this honorable Court and administered for the benefit of those entitled thereto.

Fifth. Your intervenor says that between March 6, 1909, and July 1, 1912, the complainant furnished telephone service to about 14,000 subscribers in the city limits of the City of Louisville; that most of said subscribers during said time paid to the complainant sums in excess of the rates fixed in the ordinance, all of which sums were paid under compulsion, and that all of the subscribers so paying such sums are entitled to have same refunded; that many of the payments so made to the complainant in excess of the amount fixed by the rate ordinance are small, in some cases not exceeding $5.00, and that the subscribers who have paid small sums cannot afford to institute legal proceedings to collect the amounts so paid by them to the complainant; that it is impossible for your intervenor, or for any one except the complainant, to state how many subscribers to the complainant's service have paid to it rates in excess of the legal rate, but that your intervenor believes and charges the fact to be, that at least 10,000 subscribers to complainant's service in the City of Louisville have paid to it during the pendency of this litigation rates in excess of the legal rate. Your intervenor states that for each of said subscribers to intervene in this action would necessarily cause the filing of a multiplicity of intervening petitions and suits, would add to the expense of this suit, would complicate this record, and would entail great loss of time and labor and money, that if an order of restitution is not made in this case against the complainant the result will not only cause a multiplicity of suits in this court, or in some other court, but will necessarily cause the loss of many thousands of dollars to

the small users of telephone service who cannot afford to prosecute their claim against the complainant.

Wherefore, your intervening petitioner, A. Englehard & Sons Company, prays that this, its bill of intervention, be filed herein, and that this petitioner be made a party to this cause, and that it be permitted to act herein in behalf of itself and all other persons similarly situated with respect to or interested in the restitution of excessive charges made by complainant; that the complainant be required to pay into the registry of this court within such time as the Court may fix all amounts received by it on account of payments for telephone service from subscribers in the City of Louisville in excess of the rates fixed by the ordinance of March 6, 1909, same to be administered by the Court for the benefit of whom it may concern, including your petitioner and all others similarly situated or interested; that a special master be appointed to take proof and report to the Court the amount, with interest, of the sums so collected by the complainant from its Louisville subscribers in excess of the legal rate, and that upon the coming in of the report of the
25 Master a decree be entered adjudging the complainant liable to your petitioner and to others similarly situated or interested for the excessive payments so made by them to the said complainant; that out of the fund so paid into court or otherwise, as the Court may determine, all costs and expenses incurred in the filing and prosecution of this intervening petition be paid, including the bringing into court of the fund for distribution among those who may be entitled thereto; and your petitioner finally prays for all other proper and equitable relief to which it and those for whom, and in whose behalf, it intervenes herein may be entitled.

A. ENGLEHARD & SONS COMPANY,
By V. H. ENGELHARD, *President*;
C. B. BLAKEY, *Solicitor*.

26 And, on another day of said term of court, to-wit, October 12th, 1912, the following proceedings were had:

Order.

This day came the parties by their respective counsel. The Complainant by counsel filed the affidavit of David W. Farleigh herein. The defendant by its counsel filed the affidavit of David W. Farleigh herein.

This cause coming on to be heard upon defendant's motion to enter an order nunc pro tunc as of July 9, 1909, correcting and amending the order and memorandum of proceedings of this Court as of said date, and having been argued by counsel, and the Court not being advised thereof, takes time.

27 The affidavit of David W. Farleigh filed by the Complainant, and referred to above, is as follows:

Affidavit.

Affiant, David W. Farleigh, says that he is a practicing lawyer residing in the city of Louisville, Kentucky, and that at all times herein referred to he was one of the counsel for complainant, William L. Granbery, Esquire, of Nashville, Tennessee, being the leading counsel.

On June 30, 1909, the City Attorney, Clayton B. Blakey, Esquire, representing the defendant, moved the court to impound the difference between the rates for telephone service then established
28 and charged by the complainant, and the rates for telephone service provided in the ordinance referred to in the bill, pending the litigation, to which the affiant, on behalf of the complainant, objected.

This motion was set for hearing on the 9th day of July, 1909, and came on that day to be heard. The motion was argued by the City Attorney on behalf of the defendant, and by the affiant on behalf of the complainant, Mr. Granbery not being present.

On behalf of the complainant, in opposition to the motion of the defendant, the affiant in argument stated the following things:

1. That the bill, and such affidavits as had been filed clearly disclose the fact that the Rate Ordinance set out in the bill, in its application to the business of the complainant, is confiscatory, and no doubt is raised upon the record as it stands about the complainant's right to the relief prayed for. In this attitude of the record the motion to impound should be denied.

2. That the complainant promptly proceeded to take its evidence after the suit was at issue, and the completion of the evidence on behalf of the complainant has been interrupted by the course of the defendant; and that whatever delay there is in the preparation of the case is the result of the course taken by counsel for the defendant.

3. That the injunction affects only a small part of the business of the complainant, and not its entire business, as was the case in the Consolidated Gas Company case, in New York, and that the sums sought to be impounded are only a very small part of the entire income of the complainant, and that there can be no doubt,
29 therefore, of the financial ability of the complainant to make restitution, if restitution should be required.

4. In order to meet any question of the plaintiff's liability for excess charges in case the bill shall be ultimately dismissed, and, in order to avoid, in that event, all inconvenience of procedure and multiplicity of suits, it was suggested that the order granting the injunction, when made, might contain a condition that the plaintiff would keep an accurate account, showing the amount paid by each subscriber for telephone service, and the exact character of service for which such payments were made, and showing the excess, if any, of such payments beyond the amounts which subscribers would, respectively, have been required to pay for such service under the provisions of the Rate Ordinance set out in the bill; and that, in that event, the complainant should be obliged to pay to each of its subscribers, respectively, such excess amounts; and, in case of re

fusal, that this right might be enforced by rule to be issued in this suit on motion of any subscriber.

After the argument upon the motion was completed, on both sides, Judge Evans announced from the bench that his inclination was not to decide the motion for an injunction pendente lite in any aspect until after the decision of the Circuit Court of Appeals in the Owensboro case. It was well understood by the court and counsel on both sides that a case involving the franchise of the Cumberland Telephone & Telegraph Company, in the City of Owensboro, and a case involving the rates to be charged for telephone service in that city, were involved in an appeal from a judgment of Judge Evans, which was then pending in the Circuit Court of Appeals for the Sixth Circuit. Judge Evans said further from the bench that it seemed to him that when the question should be decided it
30 would turn upon consideration of the question whether upon the showing made, there was any substantial doubt about complainant's right to the relief prayed for, that upon the existing condition of the record he had no doubt that the Rate Ordinance was confiscatory in its application to the complainant's business. He said this as indicating the tendency of his mind only. The motion made by the defendant, through the City Attorney, was then submitted for judgment and the court took time to consider it.

Pending this suit, and before final judgment, affiant ceased to be of counsel for complainant. Up to the time he ceased to be counsel, the motion made by the City Attorney remained undecided, and affiant's information is that it was never decided at all; but whether this be a fact or not the record will disclose.

DAVID W. FARLEIGH.

David W. Farleigh, affiant herein, says that the statements in the foregoing affidavit are true to the best of his knowledge and belief.

DAVID W. FARLEIGH.

Subscribed and sworn to before me by David W. Farleigh, on this the 7th day of October, 1912. My commission expires January 20, 1914.

[SEAL.]

ALLEEN B. MILLIKEN,
Notary Public, Jefferson Co., Ky.

31 The Affidavit of David W. Farleigh filed by the Defendant and above referred to is as follows:

Affidavit.

The affiant, David W. Farleigh, says that he has heretofore made an affidavit at the request of counsel for the complainant, to be used on a recent motion made by the defendant, through the City Attorney, to require the complainant to restore the sums collected by it, after the issuance of the restraining order, in excess of the amounts which would have been collected under the Rate Ordinance referred to in the bill, and he now refers to that affidavit.

The affiant states that, as counsel for the complainant, he
32 filed a memorandum brief on the motion made by the City Attorney to impound the sums collected by the complainant in excess of the Rate Ordinance. Clayton B. Blakey, Esquire, City Attorney, has informed the affiant that he has examined the files in this case and cannot find the memorandum brief referred to, and has requested affiant to furnish him with affiant's office copy of it. Accordingly, affiant annexes hereto his office copy of the memorandum brief referred to, marked "A," and states that it is an exact copy of the memorandum brief which was filed by the affiant as counsel for complainant, on the submission of the motion of the City Attorney to impound, as above stated.

DAVID W. FAIRLEIGH.

Subscribed and sworn to before me by David W. Fairleigh on this the 10th day of October, 1912. My commission expires January 20, 1914.

[SEAL.]

AILEEN B. MILLIKEN,
Notary Public, Jefferson Co., Ky.

33 The Memorandum brief referred to as Exhibit "A" in the above affidavit, is as follows:

Memorandum.

The motion or suggestion of the City to impound the excess collected by the complainant for its service in Louisville beyond the amount it would have received had the Rate Ordinance been enforced, has been submitted to the Court. We have only the following suggestions to make:

1. The bill, and such affidavits as have been filed, manifestly disclose the fact that the Rate Ordinance set out in the bill, in its application to the business of the complainant, is confiscatory, and no doubt is raised upon the record so far about the complainant's right to the relief prayed for. In this attitude of the record, the motion to impound should be denied;

2. The complainant promptly proceeded to take its evidence, and after the suit was at issue, and the completion of the evidence has been interrupted by the course of the defendant. Whatever delay there is in preparing this case is the result of the course taken by counsel for the defendant.

3. The injunction affects only a small part of the business of complainant, and not its entire business, as was the case in the Consolidated Gas Company case in New York, and there can be no doubt about the ability of the complainant to restore any excess sums which it may collect in the event the relief prayed for should be denied.

4. In order to meet any question of the complainant's liability for excess charges, in case the bill should be ultimately dismissed, and, in order to avoid, in that event, all multiplicity of suits and

to avoid inconvenience to patrons of the Company, it is sug-
34 gested that if the order granting the injunction should contain the following provisions that the justice of the situation would be fully met:

It is ordered, decreed and adjudged that the complainant, Cumberland Telephone & Telegraph Company, pending this suit and pending any appeal that may be granted and prosecuted from any final decree that shall be rendered in this suit, shall keep a true and accurate account of all sums of money paid to it by subscribers to its service within the City of Louisville, showing the amount paid by each subscriber and the character of service rendered for which such payment is made: It is further ordered, decreed and adjudged that in the event it shall be finally adjudged that the said Rate Ordinance is not confiscatory, and that the complainant's bill shall be finally dismissed, then the complainant shall file in this suit a true and accurate statement of all sums of money paid to it by the subscribers to its service within the city of Louisville, showing the amount paid by each subscriber, and the exact character of service for which such payments were made, and showing the excess, if any, of such payments beyond the amount which the said subscribers would, respectively, have been required to pay for such service under the provisions of the Rate Ordinance set out in the bill; and the complainant shall be obliged to pay to each of its said subscribers, respectively, such excess payments upon demand, and, in case of refusal, this right may be enforced by rule to be issued in this suit on motion of any subscriber; and, for the purpose of compelling the complainant to comply with this order, the suit shall be retained.

_____,

Counsel for Complainant.

35 And, on another day of said term of court, to-wit, October 15th, 1912, the following proceedings were had:

Order.

This day came the parties by their respective counsel. The Court being now sufficiently advised of the defendant's motion to correct the order of July 9, 1909, heretofore entered herein, delivered an opinion in writing, which is ordered to be filed, and pursuant thereto it is considered, ordered, and adjudged that said motion be and the same is hereby overruled.

The opinion above referred to is as follows:

36 *Opinion on Motion to Correct Order of July 9th, 1909.*

On the 12th inst. the defendant moved the Court to correct and amend an order entered herein on July 9th, 1909, in the respects set forth in the motion. No ground for the amendment suggested is stated or attempted to be stated in the motion, and nothing is contained therein which indicates that the order was not precisely

in accordance with the Court's directions. However, in support of its request the defendant has filed the affidavits of Messrs. Bruce Haldeman, C. B. Blakey and Huston Quin, the two last of whom are its counsel. Besides, each party has filed an affidavit of D. W. Fairleigh, at one time of counsel for the complainant. Mr. Haldeman is President of the Louisville Times Company which publishes an afternoon newspaper, and Wm. R. Scott was then one of its employés. The most that can be said of Mr. Haldeman's affidavit is, that he, as one newspaper man, narrates what another newspaper man had told him. It can hardly be supposed that any weight should be attached to such hearsay testimony, however accurately the affiant may have repeated what Scott told him. The most that can be said of the other affidavits is, that, from different standpoints, the affiants respectively gave their recollection of a certain colloquy that took place in the court mainly between
37 the counsel at an argument of the motion, but no one says or could say that the Court itself made or directed the Clerk to enter any order except the one appearing in the record. Without such showing it could hardly be supposed, even if the Court itself had no recollection of what occurred, that an amendment of the record should be made. The entries on the order book or journal of the court are made to cover any motions and the orders and judgments of the Court, but not the arguments and contentions made or the colloquies which take place. It is never a clerical misprision if the Clerk enters precisely what the Court directs. The colloquy described in the various affidavits may have taken place, and probably did, but, of itself, that constitutes no possible part of the record nor anything to be noticed on the order book or journal of the court. Nothing is, therefore, shown upon which the record should be changed. Besides, the Court distinctly knows that the order entered July 9th, 1909, conforms precisely to what the Court directed. For reasons then appearing the Court concluded, as is usual, to take the matter under advisement, and did so. According to this Court's final conclusion, there was no need of any deposit by the complainants to secure payment of any excess charges, inasmuch as the Court concluded that there was none. But as that condition has been changed by the Supreme Court, it may be very proper to determine in due course what deposit should be made, but that is entirely apart from the question now being determined.

We conclude that there is no proper basis for amending the order of July 9th, 1909, and equally no necessity for it, inasmuch as the order as entered leaves the question of deposit under submission.

The defendant's motion is accordingly overruled.

WALTER EVANS, *Judge.*

38 And on another day of said term of court, to-wit, November 2nd, 1912, the following proceedings were had:

Order of Reference.

This day the complainant, Cumberland Telephone and Telegraph Company, came by its counsel of record, as did the defendant, City of Louisville, by its City Attorney, and certain motions of the said defendant made herein on September 28th, 1912, coming on to be heard, were argued by counsel, and the Court being sufficiently advised, it is ordered, adjudged and decreed as to the third of said motions, namely, that one of them which, in effect, asks for an order appointing a Special Master to take proof and report the amount, with interest, collected by the complainant from its subscribers in Louisville, Kentucky, in excess of the rates fixed in the ordinance complained of in the bill, between the time the temporary injunction pendente lite went into effect, namely, on March 8th, 1909, and July 1, 1912, at which latter date counsel agree that the ordinance rates were put into effect by the complainant, should be, and it is, sustained to the extent herein indicated.

And because the Judge of this court now determines that special reasons exist therefor, to-wit, the particular fitness and experience of A. G. Ronald, Esquire, the Clerk of this court, for the work to be done, the said A. G. Ronald is appointed Special Master of the Court for this occasion, and he is directed, with all available promptness, to examine the books and records of the complainant and ascertain and report the names, and, as far as practicable, the addresses of all persons, firms and corporations who were subscribers to the complainant's service in Louisville, Kentucky, between the 8th
39 day of March, 1909, and the 1st day of July, 1912, and the sums paid by them respectively to the complainant for services rendered them within the City of Louisville between those dates in excess of the rates fixed by the ordinance of said city approved March 6th, 1909, and, as far as ascertainable, the dates on which said payments were made. He will also ascertain and report as to each subscriber the rate or amount charged by the complainant and that fixed by the ordinance, so as to show the difference between them.

The Special Master is authorized to subpœna witnesses, to require the production of the books, papers and other records of the complainant, and, if necessary, in his judgment, to employ assistants, and to take such other action as he may deem proper and necessary to enable him to comply with this order.

For the purpose of making examination of the books and records of the complainant, the Master may, if deeming it necessary, hold meetings in the City of Nashville, Tennessee, as well as in the City of Louisville, Kentucky, and shall have free access to all books and records of the said complainant which pertain to the said matters.

The Special Master is given liberty from time to time, if, in his opinion it is advisable, to apply to the Court for further instructions and for any other assistance that may be necessary to enable him to comply with this order, reasonable notice of such application to be given to each of the parties hereto.

In all other respects the said Special Master will proceed in conformity with the equity rules, and will, when his work is completed, promptly and fully report the manner in which he has performed his duties under this order.

It is also ordered that further consideration of the second of said motions, namely, that one of them by which the said defendant asks the Court to require the complainant to pay into the registry of the court all amounts received by it from its subscribers in Louisville, Kentucky, between the said dates in excess of the rates fixed by the ordinance complained of in the bill, should be, and the same is, postponed until after the coming in of the report of the said Special Master.

10 It is further ordered that another and separate motion made on September 28th, 1912, by A. Engelhard & Sons Company for leave to file a bill of intervention herein, and which bill of intervention was tendered with said motion, be, and the same is, set for hearing on November 12th, 1912.

11 And, on another day of said term of Court, to-wit, on November 7th, 1912, the following proceedings were had:

Motion.

Comes the defendant, City of Louisville, and moves the Court to amend the Order of Reference entered herein as of the 2nd day of November, 1912, by striking therefrom the following words beginning in the third to the last line on the first page, to-wit:

"to the complainant's service in Louisville, Kentucky, between the 8th day of March, 1909, and the first day of July, 1912, and the sums paid by them respectively to the complainant for services rendered them within the City of Louisville,"

and insert in lieu thereof the following words:

"to the complainant's exchange service in Louisville, Kentucky, between the 8th day of March, 1909, and the first day of July, 1912, and the sums paid by them respectively to the complainant for its said exchange service."

Defendant further moves the Court for an order striking out that portion of the said Order of Reference beginning in the fourth line of the second page of said report and which is in the following language:

"He will also ascertain and report as to each subscriber the rate or amount charged by the complainant that fixed by the ordinance, so as to show the difference between them."

Defendant further moves the Court to strike out so much of the Order of Reference as appoints A. G. Ronald, Esq., Clerk of this Court, as Special Master to perform the services referred to in said Order of Reference.

C. B. BLAKEY,
Att'y for City of Louisville.

And, it is ordered that said motion be set for hearing on November 12th, 1912.

42 And, on another day of said term of court, to-wit, November 12th, 1912, the following proceedings were had:

Order.

This day came the defendant by counsel, and filed the affidavit of C. B. Blakey.

The affidavit of C. B. Blakey above referred to is as follows:

43 *Affidavit of C. B. Blakey.*

Affiant, C. B. [illegible] says he is one of the counsel for the defendant, City of Louis[illegible]ar[illegible]t on November 2, 1912, a motion for the appointment of a Master to report on the amounts collected by the complainant from its subscribers in excess of the ordinance rates was considered and the Court requested counsel on both sides to submit a form of order not later than November 4th; that on November 6th the Clerk of this court handed to this affiant a copy of an order which he was told had been entered as of November 2, 1912. Affiant says that he was not present in court when said order was so entered and knew nothing about it having been entered until November 6th, that on November 6, 1912, on behalf of the defendant, he objected in open court to the same entered of the Clerk of this court as Special Master, but the Court refused to allow any record to be made of said objection; that he thereupon gave notice of a motion he would make on November 7th to amend said order, and on November 7th did so make said motion to amend said order.

Affiant says that as counsel for defendant he at no time agreed to the appointment of the Clerk of this court as Special Master to make the examination above referred to. He says that if the Order

44 of Reference entered herein as of the 2nd day of November, 1912, had followed the motion made by the defendant for the appointment of a Master, then the Clerk of this court, or any other intelligent person, could have executed said Order of Reference equally well; that the order as entered, however, does not follow the language used in the motion, and does not sustain said motion, but in reality is subject to an interpretation and execution which will nullify the entire proceedings wherein restitution is sought.

Affiant says that a great deal of evidence was taken before Henry Burnett, Esq., former Special Master in this cause, to show the character of service furnished by the complainant to its subscribers in Louisville, Kentucky, at the time the bill of complaint was filed; that said evidence so taken not only showed the character of service given and the conditions as they existed when the said bill of complaint was filed, but also showed the names of all the subscribers to the complainant's service in Louisville, Kentucky, who were being charged rates in excess of the ordinance rates; and affiant says that any Special Master that the Court may appoint other than Henry Bur-

nett, Esq., would not be familiar with the foregoing facts and conditions, which facts and conditions have a material bearing on the interpretation to be placed on the language used by the Court in the order in question.

Affiant says that he is of the opinion that no one could now familiarize himself with the said facts and conditions, and with the evidence in the case sufficiently to do justice between the parties in the matter of the said investigation.

As showing that this affiant did not on behalf of defendant consent to the appointment of the Clerk of this court as Special Master, affiant attaches hereto a certified copy of the proceedings in this cause of November 2, 1912, when the motion above referred to was heard in this court.

C. B. BLAKEY.

Subscribed and sworn to before me by said C. B. Blakey, this 12th day of November, 1912. My commission expires Jan. 11, 1914.

HUSTON QUIN,
Not. Pub., Jeff. Co., Ky.

45 The copy attached to the affidavit of C. B. Blakey is as follows:

THE COURT: The next matter is the case of Cumberland Telephone and Telegraph Company against the City of Louisville. What is this case here for? I am not quite advised. Is it simply for the purpose of making a reference for the ascertainment of the amount paid by subscribers in excess of the rate fixed by the ordinance?

MR. BLAKEY: That is one of the motions.

THE COURT: What is the objection to that?

MR. GRANBERRY: In our view of the case it stands as if no injunction had been awarded.

We are not asking extraordinary relief and the case is standing here as directed by the Supreme Court for the purpose of trying these rates to see whether they are confiscatory or non-confiscatory. Until that is settled it cannot be said that anyone is entitled to a refund for any period of time.

In the next case, all the patrons are not entitled to a refund, even if it is assumed that the ordinance is valid. We do not object to a reference provided it is limited to those who may be entitled.

THE COURT: If there are any who never will be entitled, the Master should be directed to ascertain those, but I do not know of any cause why all should not stand on the same footing.

MR. GRANBERRY: If anybody has paid less than the ordinance rates, they are not entitled to a refund. If anybody has used more service than they are entitled to under the ordinance rates, they are not entitled to a refund.

The Supreme Court has twice held that cities cannot regulate rates beyond their corporate limits. Now, if a patron inside of the corporate limits has used the service not only inside of the corporate limits, but, in addition, has used the service to Jeffersonville and New Albany, he cannot be entitled to a refund.

The Court: That might affect the amount, but we must first ascertain whether anybody is entitled to a refund. The only thing the Court had in mind this morning was the appointment of a Special Master to ascertain the facts on which this should be determined, and as I say this suit does not contemplate at all in itself the collection from anybody or for anybody. The ordinance only fixes the rates.

16

The only question with reference to the amounts heretofore paid is, whether it is desirable to continue the injunction in force. If the injunction is not continued, every subscriber could sue and recover. If you do not insist upon any rights under the injunction the matter would stand in that way.

Mr. Granberry: We think it is right for a reference to be ordered to ascertain and to report those who may be entitled to a refund during the time that this suit was in progress, from the time the bill was filed until July 1st, 1912, when the ordinance rates were put into effect. When that report comes in your Honor will be in a better position to decide matters.

The Court: That is not an incident to the injunction. I have thought a great deal about this term. That was the only connection I could see with anything that had been done before.

I confess I was in the dark as to whether the reversal of the final decree reinstated the case just as it was immediately before the final decree was entered, or whether there had been merged into the final decree all the previous steps and all went down with the decree. I was not satisfied as to what was the proper position, and I do not know now, and I turned it over to counsel to investigate a month ago and have not paid any attention to that from that time until now.

Mr. Granberry: On the 1st of July of this year the ordinance rates were put into effect.

I think your Honor ought to prescribe the rules under which this trial of rates should be held. In other words, I think it will probably be best for the Company to make a quarterly report for the Clerk of this court of the receipts and disbursements and the number of subscribers of the different rates under those different rates.

Now, if we do that quarterly the city authorities may file exceptions and ask for any additional information at the end of that quarter. Then, after three quarters have passed we will all know whether these rates are remunerative or unremunerative.

I think it would be proper for your Honor to enter an order something of that character, directing us how to make this experiment and how we are to try out the rates.

17

As a matter of fact, since the 1st of July we are keeping accounts of Louisville separate and distinct from all other business of the Company, and we have in effect now those ordinance rates to every one who wants them. Of course, the report as to the operation of the Exchange cannot be made at the end of the month. There is a good deal to be done, and it is nearly another month before the auditing department can have its report ready.

The Court: Of course, there are difficulties in getting up a

monthly account right on the last day of the month in any business.

Mr. GRANBERRY: Further, in July the American Telephone and Telegraph Company proposed to do the operating of the long distance toll lines for Louisville for the Cumberland Telephone and Telegraph Company, and I was asked if it would interfere with this suit, and I said I would be very glad to have it done. Almost immediately, therefore, the toll business will be separated from the regular business, and that will simplify matters.

The COURT: The Court, in writing out what its troubles were and giving counsel a copy of its ideas, had in mind to let counsel know the things that were very much on the mind of the Court, what was the proper and just way to get the matter before the Court to ultimately solve the problem. The Court at the beginning of this suit acquired jurisdiction of the subject-matter, of course. The primary purpose of the suit was to enjoin the enforcement of certain rates and the Company sought an injunction to operate during the continuance of litigation. In its terms it was to operate during the continuance of the litigation.

Now, I take it that the Court's decree having been reversed, we still have absolute control of the whole subject-matter so far as the ordinance is concerned, that is, so far as the decision of its being valid or invalid is concerned, but there is this other important consideration, that the injunction held up the operation of the ordinance until the 1st of July, 1912, and in the meantime the subscribers of the Company presumably paid either in full the Company's rates or approximately those.

Now if that injunction is utterly destroyed, there would not be any further necessity about the matter, but what shall be done with the money paid by the subscribers in the meantime, is the embarrassing question.

Of course, it is not at all certain that the subscribers will ever be entitled to get that money.

It is not at all certain that it may not be that they will not get any of it back.

We cannot tell until we try all of these matters out. Here are thousands of subscribers who are anxious to get back the money on account of information given them industriously that they are entitled to it, now. While the Court knows there is nothing of that sort, still in the future all of these matters will have to be settled either through this court or through a good many other courts to which each of the subscribers may resort separately, if we cannot control the case here in the meantime.

We cannot do it now if the injunction is not enforced. If the injunction is enforced, it restrains them from collecting that money until the litigation is finally determined, so if the injunction is not enforced, I am in trouble as to exactly what to do.

Mr. GRANBERRY: Of course no injunction is necessary for the future.

The COURT: Of course not. But I am referring to the items that have been so constantly talked about——

Mr. GRANBERRY: I was not happy in my statement. I mean no

injunction is necessary except from the time the bill was filed until July 1st, 1912.

The COURT: Is it your idea that the original injunction is still in force to prevent the collection of those overcharges?

Mr. GRANBERRY: Yes. Your Honor acquired full jurisdiction over the whole matter, and therefore under the comity existing between the Federal and the State courts no State court could
49 take any cognizance of the matter now, and with that in view I suggest that the Court order a reference to find out what these people are entitled to. When you get the information you will know what they are entitled to, but you will not until that time.

The COURT: The question is, ought we allow the parties to come in and collect while the injunction is continuing in force?

Mr. GRANBERRY: If your Honor orders the reference, when the report comes in your Honor will then know who is entitled to a refund, if anybody.

The COURT: That was foreshadowed in what I said heretofore. If this injunction is in force, and if it is desirable that it should continue in force for the purpose indicated, it affects alone the rights to the overcharge. The purpose of continuing it or keeping it in force would be for that alone.

The Court has full jurisdiction of the whole matter, and it must be easy for the Company to give a bond or deposit security as might be ultimately determined for a different amount from the overcharge. The reference is simply to ascertain this approximately, the overcharges of the amount collected by the Company, and when we ascertain that, then the Company can give a bond for the amount or pay the money where the persons who have been overcharged by reason of the Court's injunction would have a proper remedy.

The Court feels under that much obligation to those who have paid the overcharges. This Court would feel under obligations to them to see that its acts, which the Supreme Court has said were erroneous, should not work to the detriment of those who obey the injunction, and I think the only thing to do is to appoint a Special Master.

Mr. GRANBERRY: Unless there is contemplated insolvency, or a probability or possibility of probable loss to these people, no bond is necessary just now. I think your Honor will be in better position to deal with that question when the report of the Clerk comes in.

The COURT: We haven't said anything about a bond now. All we can do is to ascertain the amount. The Court is obligated to take care of those who obeyed its injunction.
50 The Court might at the outset have required the Company to have given just such a bond as would cover all such contingencies, but the Court, as Judges sitting by themselves sometimes do, had an overconfidence, as it developed, in the accuracy of its judgment in this case.

It never for a moment doubted the accuracy of it or the invalidity of the ordinance.

I would have been glad if the Supreme Court had convinced me that I was wrong, but the most that can be claimed for the opinion

of the Supreme Court, speaking respectfully, is, that it arbitrarily reversed this Court without giving an opinion——

Mr. GRANBERRY: They said they didn't know.

The COURT: And that being so, the Court being so instructed would not continue the injunction without security.

I would not have done it at the outset except it was plain that the Company was good to meet all of the charges in the first place; and, second, that the ordinance on its face would result in confiscation.

Those ideas of the Court having — dispelled by the decision of the Supreme Court, if not by any statement in the opinion, has changed my view as to the necessity of a bond and I think I should require a bond of the Company, but the point I think now is, that we are now in such a condition that we do not know what the bond should be and there should be an order of reference in the case to a Special Master to find out.

I will not refer such a small matter to Mr. Burnett, I will not trouble him with it, but I will refer it to Mr. Ronald to ascertain and report, and what I want now from the attorneys is, as to what instructions should be given to the Special Master on this case.

Mr. BLAKEY: There are two motions pending here, one is the motion to refer to the Master to ascertain and take proof, and report the amount, with interest, collected by the plaintiff from the subscribers in the Louisville Circuit in excess of the rate fixed in said ordinance.

The COURT: The only question with me now is, what instructions shall be given to the Master.

Mr. BLAKEY: I assume that you will appoint a Special Master, in other words, that you will sustain that portion of the motion.

51 The COURT: Yes, in effect.

Mr. BLAKEY: Now, as to the portion of the motion reading as follows: "The defendant further moves the court for an order requiring complainant to pay into the registrar of the court within such time as the Court may fix, all amounts received by it on account of telephone services in Louisville in excess of the ordinance of March 6th —."

The COURT: That portion of the motion will not be determined now. I will only appoint a Special Master to ascertain the amount apparently due the amount of the overcharge, and if counsel have any ideas as to what special directions should be given to the Master in regard to this matter, I shall be glad to hear them.

Mr. BLAKEY: Now, what are the duties of the Special Master in this respect? The Special Master will have to have accountants or must be an accountant himself and go to the books of the Cumberland Telephone Company and go over those records for a period of three years.

The COURT: I don't care for that. That will come up in the matter of administration. If the Master finds it necessary to do that, he can report.

Mr. BLAKEY: At the time the suit was brought the Company had ninety-six hundred of subscribers paying monthly and quarterly. Therefore, in order for the Master to determine the amount the

subscribers paid, it would be necessary for the Master to look at the account of every one of those ninety-six hundred subscribers for every one of the thirty-six months involved.

The COURT: I do not undertake to say what the Master will have to do.

Mr. BLAKEY: Now, so far as the order from the Master, he will receive reports from the Cumberland Telephone Company, and there is no motion here for any such order as that.

The COURT: We haven't got to that yet. The only question is, as to what other instructions shall be given to the Master. The instructions will be general, and if the Master wants any additional instructions in the future, the Court can give them. If he
52 cannot do what he is directed to do without further assistance, we will attend to that when the time comes. The Master will find out what he has to do. So, for the present, the order will be—I do not suppose it would be any matter of great difficulty, only a matter of tedious detail. I had not supposed for a moment that it would be a matter of great difficulty.

Mr. BLAKEY: The Cumberland Telephone Company in its petition said that the excess which it is collecting over what it ought to collect under the ordinance was $33,000 a year, so that there is in reality according to its own admission, $33,000 a year.

The COURT: I have no idea that this matter is going to be anything like as complicated as you suggest, but if the Special Master finds it so, we can adopt such measures as will suit the new conditions. At present it does not seem to me to be any matter of great difficulty at all. Hence, I think the Clerk can try his hand at it.

Mr. GRANBERRY: The Clerk is a sensible man and if Mr. Blakey wants to talk to him——

The COURT: There is no use of throwing compliments to the Clerk. The order will simply be that Mr. Ronald will examine and ascertain how much had been collected in excess of the lawful rate. Either one of you can submit your form of an order, and I will now, so far, sustain the motion as to appoint Mr. Ronald Special Master to ascertain the things that I have indicated, but further than that we will not go now.

As to the other matter, the Engelhard matter, I doubt whether Mr. Engelhard will ever find it necessary to come into the case. If there is anything to be collected, it will be attended to, and there is no occasion for the intervention of an outsider.

Mr. BLAKEY: Mr. Engelhard represents the people really entitled to this money.

The COURT: We don't know that anybody is entitled to one cent of this fund, but Mr. Engelhard says that he is entitled to it and he petitions the Court to permit him for himself and for others situated in like circumstances, to intervene and represent that interest, and it certainly
53 The COURT: As I say now, I do not see any necessity at present for Engelhard or anybody else to represent anybody else on that question. When we ascertain the amount, we will make the Company give security for the payment, and when the time

comes, if it ever comes, Mr. Engelhard can take the matter up then.

Mr. BLAKEY: Mr. Engelhard is more interested right now than he will be when the Master completes his report, because, when the Master completes his report, there is nothing further to be done except the pass upon it by the Court, whereas, during the time the Master is making up his report before he makes the report, Mr. Engelhard and those for whom he files his bill of intervention are vitally interested, and if this motion is going to be passed on at all it should be passed on now.

It seems to me the Court should overrule or sustain Mr. Engelhard's motion.

The COURT: We won't do that. We will hear from the Master first. If there is any difficulty about it he will have every opportunity to be heard.

Mr. BLAKEY: Just let us look at the situation. They have admitted that they have collected $33,000 a year, or $100,000 in excess of the City Ordinance rates. The City is not interested in that amount at all, but Mr. Engelhard and those who he represents are vitally interested in that.

The COURT: Do you represent them?

Mr. BLAKEY: Yes.

The COURT: I suppose you did because you made the motion, but I will not at present pass on that.

Mr. BLAKEY: Now, as to the matter of bonds, it seems to me it is not a proper course to take for the Court to wait until the Master makes his report before a bond is required.

If a bond is required at all, it ought to have been given July 9th, 1909, or when the petition was filed and the preliminary injunction was ordered, and if it were not given then, it should be given now, and the Court ought not to wait one day or two days or three days or a month for the Master to make a report before he orders that bond.

51 The COURT: The whole purpose of the pending motion is for the purpose of ascertaining how much the bond should be, and that will not take long unless retarded unnecessarily. As soon as the Master ascertains that, we will then consider the question as to how we will secure that bond. Of course, at the outset, we didn't have any basis on which to ascertain that.

Mr. BLAKEY: We had their admission, that they were collecting $33,000.00 a year.

Mr. GRANBERRY: Which Mr. Blakey disputes, and says is not true.

The COURT: We will find from the Master what the bond should be. We might fix a penalty wholly inadequate. There is no necessity to hurry right now. The Court has always disposed of questions promptly, and we could not tell at the outset what the penalty of the bond should be, but now the bond will be fixed at a penalty that will not increase. It will cover the matters that do not decrease, but remain the same. We will get a bond to cover every possible contingency and, hence, the necessity of awaiting.

Mr. BLAKEY: All of the bonds in similar suits have been bonds to make restitution.

The COURT: You cannot know how much finally should be paid until the Master reports. We do not want to discuss the matter any further. Counsel may draw an order or form of decree conforming to these ideas of the Court, and I will consider both if they cannot agree.

Mr. BLAKEY: Your Honor will not pass on the Engelhard motion at all?

The COURT: Not now. In my view of the case there is no necessity of it. Mr. Engelhard will be given every opportunity to assert his right.

Mr. BLAKEY: But I should like to know what order the Clerk will be directed to enter on the ruling on the Engelhard petition.

The COURT: There will not be any order entered at all. The motion is pending. You can bring it up from time to time when you think there is any necessity, and as soon as I think it is proper the Court will pass on it.

55 Mr. BLAKEY: Will your Honor take it under submission?

The COURT: No, just leave it as it is.

Mr. BLAKEY: Will your Honor make an order on the books declining to consider it?

The COURT: No, I will leave it in suspense.

Mr. BLAKEY: All I want is some record on the matter.

The COURT: You can say the matter was not disposed of or heard.

Mr. BLAKEY: Will you have the record show that?

The COURT: The record may show that that motion was not heard, that the Court does not think it necessary to hear it now, but will do it in the future when any necessity for it arises.

The foregoing seventeen pages comprise a full and accurate statement of the proceedings in the United States Circuit Court for the Western District of Kentucky in the case of the Cumberland Telephone and Telegraph Company against the City of Louisville, on November 2nd, 1912.

CLARENCE E. WALKER,
Stenographer.

56

Order.

This day came the parties by their respective counsel. This cause coming on to be heard upon the motions of the defendant, City of Louisville, Kentucky, to correct the order of November 2nd, 1912, which motions were entered on November 7th, 1912, and the Court being sufficiently advised thereof, delivered an opinion in writing which is ordered to be filed; and pursuant thereto, it is considered, ordered and adjudged that each and every of said motions be overruled and denied.

57 The opinion above referred to is as follows:

Opinion on Motions to Correct Order of November 2, 1912.

On September 28th the defendant, in writing, moved the Court as follows:

"Defendant further moves the Court for an order requiring complainant to pay into the registry of this court within such time as the court may fix all amounts received by it on account of payments for telephone service from subscribers in the city of Louisville in excess of the rates fixed by the ordinance of March 6, 1909, and for an order appointing a special master to take proof and report to the Court the amount, with interest, so collected by complainant from the subscribers to its Louisville service in excess of the rates fixed in said ordinance, and that upon the coming in of the report of the master a decree be entered ordering the complainant to pay into court all sums so collected by it."

The first of these motions, namely, that which asks for an order requiring payment of money into court, was not granted because manifestly it would be premature to require that to be done until the second of the motions was granted and the facts ascertained by the Special Master. And, indeed, this seems to have been the idea of the defendant as shown by the last clause of its motion. The questions arising on the second of the motions were fully argued by counsel, and the Court at once, orally, announced its conclusions and stated, first, that the order of reference would be made; and, second, that Mr. Ronald, the Clerk, would be appointed a Special Master for the purpose contemplated. Mr. Blakey, the City
58 Attorney, at once volunteered the statement that Mr. Ronald's appointment would be entirely satisfactory, and was followed by defendant's counsel who also expressed their satisfaction. These statements were voluntarily and spontaneously made by the counsel. They had not been invited by the Court. Indeed, as the appointment of a Master is entirely within the power and discretion of the Judge, he rarely invites suggestions thereon, preferring (as he thinks it best) to appoint some one who has not been suggested by either side. In this case at the time, and in the way, indicated Mr. Ronald's appointment was made and announced. That being so, and the conclusions of the Court upon the general proposition involved in the motion having been stated, some differences were developed as to the details of the order to be entered, and the Court suggested to counsel on the respective sides that each of them present in writing their idea as to the form of an order so that the Judge could compare them and draw up the order in such form as might meet the Court's views. This was on Saturday, the 2nd inst. On Monday, the 4th, the suggestions in writing were presented. Those of Mr. Blakey, the City Attorney, so far as necessary to state them, were in this language:

"This day came the complainant, Cumberland Telephone & Telegraph Company, by counsel, and also the defendant, City of Louisville, by counsel, and this cause coming on for hearing on the mo-

tion of defendant for an order requiring the complainant to pay in the registry of this court all amounts received by it on account payments for telephone service from subscribers in the City of Louisville in excess of the rates fixed by the ordinance of March 6, 1909 and for an order appointing a Special Master to take proof and report to the Court the amount, with interest, collected by the complainant and the Court being sufficiently advised, it is now ordered.

That A. G. Ronald, Esq., Clerk of this court, be, and he is hereby appointed Special Master of this court, and as such Special Master is hereby directed to forthwith examine the books and records of the complainant, Cumberland Telephone & Telegraph Company, and ascertain and report to this Court on or before December 15th, 1912 the names and addresses of all persons, firms or corporations who were subscribers to the complainant's service in Louisville, Kentucky between the 8th day of March, 1909, and the first day of July, 1912 and who paid the said complainant sums for its exchange service in excess of the rates fixed by the ordinance of the City of Louisville approved March 6th, 1909, together with the dates on which said payments were made."

59 Those sent in by Judge A. P. Humphrey for the Telephone Company were, so far as need be stated, in this language:

"Upon the motion of the defendant the Court appoints A. G. Ronald, because of his especial fitness, Special Master in this cause, to take proof and report to the Court at as early a date as practicable the names of all subscribers in the City of Louisville who have used and received telephone service prescribed and required under an ordinance adopted by the City of Louisville on March 6, 1909, and set out in the pleadings in this cause, and who have paid for said service amounts in excess of the requirements of said ordinance, between March 7, 1909, and July 1, 1912.

It appears to the Court that the bill in this cause was filed on March 7, 1909, and the rates prescribed in said ordinance were put into effect July 1, 1912.

The Special Master, in his report, will set out the names of such patrons and the amounts paid in excess of said ordinance requirements between the dates above mentioned."

With these suggestions before us we considered the subject, and industriously and carefully prepared the order decided upon on November 2nd, but not fully drawn out in detail until later. The defendant has moved the Court to amend the order in certain respects, but the Court is entirely satisfied with it, and the motion in all its parts will be overruled. None of the proposed amendments appear to have the least importance unless in respect to a mere form of words, and the substitute suggested for some of the words used will, no doubt, in the practical work of the Special Master, turn out to be entirely immaterial. Besides, the language suggested by the defendant is obviously different from that which appears in the motion. For example, in those suggestions for the first time appears the phrase "exchange service" in this connection.

The last change asked for in the motion relates to the Special Master: This one of the motions is in the following language:

"Defendant further moves the Court to strike out so much of the order of reference as appoints A. G. Ronald, Esq., Clerk of this court, as Special Master to perform the services referred to in said order of reference."

No ground for a change is suggested in the motion, and none exists.

60 The reference is one for ascertaining details enormous in number, though very simple in individual instances. The names and addresses of probably 15,000 persons will have to be accurately ascertained, the amount paid by each of those persons to the Company as subscribers for the use of its telephones during a period of over three years must be found, and the difference between what those persons each actually paid and what they would have paid if only the rates fixed by the City's ordinance of March 6th, 1909, had been collected, will have to be computed. The principal object of the reference was to ascertain those figures. This very uninteresting, but exceedingly tedious, work will require great industry, great patience in dealing with small details, great accuracy, and a great amount of time and labor. Few men competent to do the work are available, inasmuch as, no doubt, their ordinary occupations would hardly permit it. But Mr. Ronald is admirably fitted for it, and the Court is gratified that he can undertake it.

Our idea, as has been in many ways stated and kept steadily in view, is, that the principal, if not the sole, object of the reference is to ascertain the amount of excess rates paid separately by the patrons of the complainant and the names of the persons who paid the same, so that we may know the amount of cash to be put up, or the amount of security to be given, in case an injunction is now or may hereafter be in force, and in this way to protect the persons who shall be found to have paid the excessive rates, should it ultimately be determined that the ordinance enacted by the defendant is valid. This being the object the Court has in view, it does not seem to be very important to consider suggestions as to a wider range of the Special Master's duties, whether those suggestions come from the one side or the other.

The suggested change in the Order in this respect appears to be altogether without merit.

Ordinarily, such obvious motions would be disposed of without writing an opinion, but it has seemed best in this instance to put on record an accurate statement of what took place.

61 Of course, the Court did not overlook the fact, nor did Judge Humphrey in his suggestions overlook it, that the Clerk is only conditionally eligible to appointment under Section 68 of the Judicial Code, the provisions of which have been recodified from a statute passed in 1879, and upon which the courts have always acted. See 20th Stats., 415. In making the appointment of Mr. Ronald the Court, in the proper and accepted way in the order entered, fully met the conditions prescribed by the statute. It is the custom of the Court to use sparingly the power to appoint

its Clerk to a mastership, and only does so where it appears to be as in this instance, particularly appropriate.

Motions overruled.

WALTER EVANS, *Judge*.

62 *Judgment on Motion of A. Englehard & Sons Company.*

This day came the complainant by Messrs. W. L. Granbery and A. P. Humphrey, its counsel, and came also A. Englehard & Sons Company, Incorporated, by C. B. Blakey, Esq., its counsel, and the motion of A. Englehard & Sons Company made herein on September 28th, 1912 for leave to file a bill of intervention in this cause coming on to be heard, was argued by counsel, and later in the day the Court, after consideration, being then sufficiently advised, delivered its *opinion* in writing, which is filed, and in accordance therewith it is ordered, adjudged and decreed that the said motion

63 for leave to file said petition for intervention should be, and it is, overruled and denied, but this action is without prejudice to the right of said A. Englehard & Sons Company again hereafter to tender their said or any like bill of intervention, and again to move for leave to file the same whenever it shall appear to be proper, under the views expressed in said opinion, it not being intended that the determination of the questions arising on the present motion shall be final, but only as postponing the matter until the proper time. The said A. Englehard & Sons Company except to the foregoing ruling of the Court, and is given leave to tender its bill of exceptions so as thereby to make its said petition a part of the record in this cause.

64 The opinion above referred to is as follows:

Opinion on Motion of A. Englehard & Sons Company.

The Primary, if not the exclusive general purpose of the complainant in this suit is to obtain an injunction against the enforcement of the ordinance of March 6th, 1909, by which the defendant fixed the rates to be charged subscribers for telephone service rendered by the complainant. Granting such injunction necessarily depended upon whether the rates fixed by the ordinance were so unreasonably low as to prevent the earning by the complainant of a fair return upon its property used by the public. After a most laborious investigation this Court granted the relief sought, but upon appeal the Supreme Court was not content, under the circumstances stated in its opinion, to let the injunction stand, or to prevent the enforcement of the ordinance until it was put into effect so as to ascertain by actual test and experiment whether the rates it prescribed were what are called confiscatory, and accordingly it reversed this Court's judgment, with directions to give the ordinance rates a trial. The mandate of the Supreme Court was transmitted to the City Attorney, who, on September 28th, 1912, produced and filed it, and the case was restored to the docket for the purpose of

obeying the mandate of the Supreme Court. On that day also a motion was made in this language, namely:

"Comes A. Engelhard & Sons Company by its counsel, C. B. Blakey, and moves this Honorable Court for leave to file in
65 this cause its bill of intervention tendered herewith on behalf of itself and all other persons who have paid to the complainant for telephone service in the City of Louisville since March 6, 1909, sums in excess of the legal rates, and wherein it seeks to have the complainant make restitution of the overcharges collected by it from its subscribers for telephone service in Louisville."

The bill of intervention set up in detail the facts upon which the relief described in the motion is asked. The trial of the ordinance rates required by the mandate of the Supreme Court will necessarily take more than a year, probably, indeed, two years or more. If it shall then turn out that the ordinance rates are confiscatory, neither the A. Engelhard & Sons Company or any one whose situation is similar will be entitled to recover anything from the complainant. The contrary will be the case if the actual and practical test of those rates shall show them to be just and reasonable. Until this last proposition is established by the test referred to, neither the A. Engelhard & Sons Company or any other subscriber will be entitled to recover any overcharge rates for the period between March 8th, 1909, and July 1, 1912, at which last date counsel appear to admit that the complainant put the ordinance rates into effect for the purposes of the test directed by the Supreme Court. Obviously, no person has as yet a matured cause of action for any sum, exacted of subscribers in excess of the ordinance rates, and they cannot have a matured cause of action therefor until the test of the ordinance rates has been finally concluded and the result ascertained. The Court, as shown by the record, on motion of the complainant, on March 8th, 1909, granted an injunction restraining, during the pendency of this action, the enforcement of the ordinance rates. At the final hearing, the temporary injunction thus granted was made perpetual, so that until the reversal of this Court's judgment by the Supreme Court, the complainant's own rates were in force from March 8th, 1909, until July 1, 1912. Litigation over any claim of excessive charges during this period appears to be wholly out of the question at this time, inasmuch as the prime factor for determining whether there have been excessive charges depends upon the final determination in the future of the question whether the ordinance rates
66 are confiscatory, and the final determination of that question, in turn, cannot be effected until the final judgment in this cause, which can only be rendered after a fair and full trial of the ordinance rates with a view of seeing whether or not they are confiscatory. The Court has already, on the defendant's motion, appointed a Special Master to ascertain the amount of any excess charges paid by each Louisville subscriber during the period referred to, and that work, though one of great detail, will no doubt be done and reported long before the final decree can be entered on complainant's prayer for relief. This reference to the Special Master at this time, in the view and intention of the Court, has for its principal

object the ascertainment of the amounts paid in excess of the ordinance rates by each and every of the Louisville subscribers, so that if the original or any other injunction pendente lite is made or continued in force, an ample amount of money or security therefor should be provided by the complainant to make certain the prompt payment to the persons entitled of any and all excessive charges together with interest thereon. The complainant being entirely solvent, and the Court being altogether confident, at the time, of the correctness and propriety of its action, no bond to cover such excessive charges has heretofore been exacted. But the mandate of the Supreme Court has radically changed the situation, and security should be required as soon as the amount to be covered can be ascertained, at least approximately, under the reference referred to, and out of abundant caution it is the intention of the Court to make the security ample to cover all reasonable contingencies, including interest, and to do this when the Special Master shall have reported and thereby informed the Court of all the excess charges. The complication which such report will, it is hoped, to some extent, relieve grows out of the fact that the operation of the injunction ceased as to future charges on July 1, 1912, but had been in full force as to complainant's rates up to that date. A. Engelhard & Sons Company has no greater right to litigate now a claim to recover excessive rate charges than that corporation would have had if, at the outset, a bond in a penalty of $200,000,000, or any other sum, had been
67 taken to cover any damages that might have been incurred by reason of the injunction when it was granted on March 8th, 1909. The complainant and its surety on such a bond, if it had been taken, could not be sued until the final judgment in the case. The matter, so far as recovering excessive rate charges at this time is concerned, rests upon considerations which are entirely analogous to the case just indicated. Such claims depend upon the validity or invalidity of the ordinance, a question, the determination of which is yet in the future.

Equity Rule XLVIII is as follows:

"When the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

This rule, and not the Kentucky practice, governs in such matters in this court, and in a case where the parties are very numerous, the Court may, in its discretion, dispense with the presence of some of them; provided there are sufficient parties before the court to represent all the adverse interests. But as expressly provided in the rule, no one not actually a party will in any way be bound by the decree. The Court by this rule will have the advantage when it considers the case of hearing argument for every adverse interest, but it does not authorize the Court to make an order such as asked for.

We had stated from the bench our view, that, as no cause of action had as yet matured, the bill of intervention referred to in the motion and the proposition to file it, should be held in abeyance until, by the final decree, it can be ascertained whether any excessive rate charges have in fact been collected, and then to permit the filing of the bill of intervention, for then a cause of action might have matured. Our view was, and still is, that this was the better course for the A. Engelhard & Sons Company, and we much doubt whether there can or will ever be any serious litigation or question over the liability of the complainant to refund to every subscriber who has paid excessive rates the amount of such excess if the ordi-
68 nance is upheld. In that event, the matter will be extremely simple, for all subscribers, upon the presentation of their receipts, would most likely be promptly paid the difference between the excess rates and those of the ordinance. But counsel for A. Engelhard & Sons Company has very positively insisted upon a decision of the motion at this time. Yielding to this view rather than our own, we will dispose of the motion now.

For the reasons indicated, and upon what appears to be a proper exercise of the Court's discretion, the motion of A. Engelhard & Sons Company for leave to file its bill of intervention is overruled and denied, but without prejudice to the right of A. Engelhard & Sons Company again to tender their said bill and again to move for leave to file the same whenever it shall appear to be proper under the views we have expressed, it not being intended that the determination of the question arising on the present motion shall be final, but only as postponing the matter until the proper time.

WALTER EVANS, *Judge*.

69 And, on another day of said term of court, to-wit, February 15th, 1913, the following proceedings were had:

Motion.

This day came A. Engelhard & Sons Company by Clayton B. Blakey, its counsel, and filed a notice duly accepted by complainant and defendant, and pursuant thereto moved the Court to be allowed to file[d] its Bill of Intervention herein, and the Court not being sufficiently advised thereof, takes time.

The Bill of Intervention of A. Engelhard & Sons Company above referred to is as follows:

70 *Bill of Intervention of A. Engelhard & Sons Company.*

To the Honorable Walter Evans, Judge of United States District Court for the Western District of Kentucky:

Your intervenor, A. Engelhard & Sons Company, on behalf of itself and all other subscribers to the Cumberland Telephone & Telegraph Company's service who have paid to said company since

March 6, 1909, for telephone service sums in excess of the legal rate which said complainant was authorized to charge for its services comes and by leave of court files this, its bill of intervention, in the above entitled cause and states:

First. That your intervenor, A. Engelhard & Sons Company, is a corporation duly incorporated and existing under and by virtue of the laws of the State of Kentucky, and having its principal place of business in the City of Louisville, Jefferson County, Kentucky.

Second. That your intervenor on the 22nd day of June, 1909, tendered and sought to have filed a bill of intervention in the above styled cause, wherein it sought to have this Court modify the restraining order granted in the cause and eliminate from its provisions this intervenor and all other Louisville subscribers to the telephone service of the complainant; that the object of your intervenor in seeking to have said restraining order so modified was in order that it and the other subscribers to the complainant's service might avoid paying to the complainant for telephone service a rate in excess of that fixed by the ordinance of March 6, 1909; that, as shown by the record in this cause, the said bill of intervention was not allowed to be filed.

71

Third. That on the — day of September, 1912, it tendered and sought to have filed its bill of intervention in the above styled cause, wherein it petitioned this Court for leave to act for itself and all other subscribers to the complainant's telephone service who had, between Mar 6th, 1909, and July 1st, 1912, paid to the complainant for the telephone service sums in excess of the rates fixed by the ordinance of March 6th, 1909; and wherein it sought to have this Court order the complainant to pay into the registry of this court all such sums, and for an order distributing same among those entitled thereto. Your petitioner says that as shown by the record, the said bill of intervention was not allowed to be filed.

Fourth. Your intervenor says that it is and has been since March 6th, 1909, a subscriber to the telephone service of the complainant; that it has been paying for the use of said service the sum of $5.00 per month during all of the times between March 6, 1909, and July 1, 1912, which said sum is subject to a discount of fifty cents per month for prompt payment, or a net sum in favor of said complainant of $4.50 per month; that your intervenor has what is known and designated as a business party line, service unlimited, and that by and under the terms of the ordinance of March 6th, 1909, the rate for said service is limited to $4.00 per month, and that said complainant was at no time subsequent to March 6th, 1909, authorized to charge or collect a greater rate than $4.00 per month for said service; that had your intervenor at any time between March 6th, 1909, and July 1st, 1912, refused to pay the rate charged by the complainant for said telephone service, said complainant would have taken from this intervenor's place of business the telephone there installed and would thereby have deprived it of the use of said telephone service.

Fifth. Your intervenor says that between March 6th, 1909, and

July 1st, 1912, the complainant furnished telephone service to about
14,000 subscribers in the city limits of the City of Louis-
72 ville; that about eight thousand (8,000) paid to the com-
plainant sums in excess of the rates fixed in the ordinance, all of which sums were paid under compulsion, and that all of the subscribers so paying such sums are entitled to have same refunded; that many of the payments so made to the complainant in excess of the amount fixed in the rate ordinance are small, in most cases not exceeding Twenty ($20.00) Dollars, in many cases not exceeding Five ($5.00) Dollars, and in no case exceeding One ($100.00) Hundred Dollars, and that the subscribers who have paid said sums cannot afford to institute legal proceedings to collect the amounts so paid by them to the complainant; that it is impossible for your intervenor, or for any one except the complainant, to state how many subscribers to the complainant's service have paid to it rates in excess of the legal rate, but that your intervenor believes and charges the fact to be that at least eight thousand (8,000) subscribers to complainant's service in the City of Louisville have paid to it during the pendency of this litigation rates in excess of the legal rate. Your intervenor states that for each of said subscribers to intervene in this action would necessarily cause the filing of a multiplicity of intervening petitions and suits, would add to the expense of this suit, would complicate this record, and would entail great loss of time, labor and money; and your petitioner herein says that the right of restitution herein asserted is a right common and general to all persons paying sums for telephone service in excess of the rates fixed in the ordinance of March 6th, 1909, and that this petitioner belongs to that class; that if an order of restitution is not made in this case against the complainant, the result will not only cause a multiplicity of suits in this court, or in some other court, but will necessarily cause the loss of many thousands of dollars to the small users of telephone service who cannot afford to prosecute their claims against the complainant.

Sixth. Your intervenor further says that it is informed and believes, and charges the fact to be, that during the pendency
73 of this litigation, to-wit, on July 9, 1909, the Judge of this court refrained from modifying the temporary restraining order granted in this cause and refrained from requiring the complainant to pay into court the charges made by it for telephone services in excess of the rates fixed by the ordinance of March 6th, 1909, and refrained from requiring the complainant to give a bond to restore said payments solely for the reason, and because of the fact that the complainant through its counsel stated and agreed in open court that if the Court would not make any such order, then in that event the complainant would guarantee to refund and repay to each and every subscriber to its service in the City of Louisville all amounts which said subscribers might pay to said complainant in excess of the rates fixed by the ordinance of March 6th, 1909, provided said ordinance on final hearing was not declared to be confiscatory, and to this end would keep an accurate account showing the amount paid by each subscriber for telephone service;

and your intervenor charges that said stipulation hereinbefore referred to was the consideration which induced the Court to withhold its order requiring the complainant to pay into court, or to give bond for restitution of the charges made by it for telephone service in excess of the rate fixed by the ordinance of March 6th, 1909, and that said statement constituted a pledge that the complainant would promptly repay all such collections in the event the said ordinance should not be declared confiscatory. Your petitioner says that the collection of rates for telephone service in excess of the rates fixed by the ordinance of March 6th, 1909, was an illegal exaction of money, and that the money so exacted and received by the complainant is not the property of the complainant but is the property of those paying such excessive rates, and the amount thereof constitutes a trust fund which should be paid into the registry of this Honorable Court and administered for the benefit of those entitled thereto.

Seventh. Your petitioner says that the Special Master heretofore appointed by this Court to ascertain the amounts collected
71 by the complainant in excess of the legal rates and the names of those from whom such collections were exacted has not yet made his report, but will make same shortly, and it is important to your petitioner and the other subscribers to the complainant's service to know whether or not the said report, when made, shows the names of all those who have made excessive payments to the complainant, and whether the amounts as reported are correct, and to be permitted to point out to the Court any errors that may appear in said report of the Special Master, to the end that the rights of all the parties in interest may be protected; and your petitioner further represents that its attorneys were attorneys for the defendant until the 15th day of December, 1912, on which date they ceased to represent the defendant; that the said attorneys are thoroughly familiar with the record in this case, and with the rights of your petitioner, and the other subscribers to the complainant's service, and have been requested by your petitioner and more than one thousand of said subscribers to represent this petitioner in this cause and to aid in protecting any rights the subscribers to the complainant's service may have in the collection and distribution of excessive charges made by the said complainant.

Your petitioner says that as shown by the record in this case, the defendant, the City of Louisville, as a municipal corporation, has not paid to the complainant any sums in excess of the ordinance rate, and is, therefore, not entitled to have refunded to it any part of the sums charged by the complainant in excess of the rate ordinance; that said City in representing the subscribers to the complainant's service in the matter of recovering sums paid by the subscribers to the complainant's service is acting pro bono publico merely, and not as a real party in interest, nor as a representative of a class.

Wherefore, your petitioner, A. Engelhard & Sons Company, prays that this, its bill of intervention, be filed herein, and that this petitioner be made a party to this cause, and that it be permitted to

act herein in behalf of itself and all other persons similarly situated with respect to or interested in the restitution of ex-
75 cessive charges made by the complainant; that the complainant be required to pay into the registry of this court, upon the approval of the Master's report, all amounts received by it on account of payments for telephone service from subscribers in the City of Louisville in excess of the rates fixed by the ordinance of March 6, 1909, together with interest thereon at the rate of six (6%) per cent per annum from the time such excessive payments were made, same to be forthwith distributed for the benefit of whom it may concern, including your petitioner and all others similarly situated or interested; that upon the coming in and approval of the report of the Master a decree be entered adjudging the complainant liable to your petitioner and to others similarly situated or interested for the excessive payments so made by them to the said complainant, together with interest thereon as aforesaid; and ordering said complainant to pay into court said sums so found; that out of the funds so paid into court, or otherwise as the Court may determine, all costs and expenses incurred in the filing and prosecution of this intervening petition be paid, including an attorney's fee to petitioner's attorneys for their services herein; and your petitioner finally prays for all other proper and equitable relief to which it and those for whom and in whose behalf it intervenes herein may be entitled.

A. ENGELHARD & SONS COMPANY,
By V. H. ENGELHARD, *President*.
C. B. BLAKEY,
HUSTON QUIN,
Solicitors.

UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

On this 11th day of February, 1913, before me personally appeared Victor H. Engelhard, who is president of the intervenor, A. Engelhard & Sons Company, a corporation, and its chief and highest officer, who made solemn oath that he had read the foregoing bill of intervention subscribed by him, and knows the con-
76 tents thereof, and that the same is true to his own knowledge except as to the matters therein stated on information and belief, and to those matters he believeth to be true.

VICTOR H. ENGELHARD.

Subscribed and sworn to before me by Victor H. Engelhard, this 11th day of February, 1913. My notarial commission expires on the 10th day of January, 1914.

HUSTON QUIN,
Notary Public, Jefferson Co., Ky.

77 And, on another day of said term of Court, to-wit, March 10th, 1913, the following proceedings were had:

Order on Motion of A. Englehard & Sons Company for Leave to File Bill of Intervention.

A. Engelhard & Sons Company, a corporation, having heretofore on February 15th, 1913, tendered to the court and prayed for its leave to file a bill of intervention in this action, and said motion coming on to be heard, and having been argued by counsel, and the court having carefully considered the same and being now fully advised, delivered its opinion thereon in writing, which is filed, and pursuant thereto it is now ordered, adjudged and decreed that upon the deposit with the Clerk by the said A. Engelhard & Sons Company of a sum probably sufficient to cover its costs herein, its said bill of intervention will be at once filed, and when that is done the said A. Engelhard & Sons Company shall thenceforth be a party defendant herein for the purpose of making its claim to any sum it may have paid the complainant for the use of its telephone service in the city of Louisville, Ky., during the period between March 8, 1909, and July 1, 1912, over and above the rates for such service prescribed by the ordinance enacted by said City and set forth in the bill of complaint herein. At the election of the said A. Engelhard & Sons Company it may treat its bill of intervention as its claim herein subject to the complainant's right to move to require it to be made definite and certain in its averments or it may replead so as explicitly to state its claim and the nature and amount thereof. But so far as the said A. Engelhard & Sons Company by its said bill of intervention prays to be permitted to act or claim herein for or on behalf of any other person than itself its prayer is denied and overruled, but with liberty to renew
78 the same whenever it shall be made to appear to the court in any appropriate way that other specifically-named claimants of such overcharges desire the said A. Engelhard & Sons Company to act for them herein, said Company shall be at liberty to apply for leave to do so.

79 The opinion above referred to is as follows:

Opinion on Motion of A. Englehard & Sons Co.

The court has considered the motion of A. Englehard & Sons Company made February 15th, 1913, for leave to file a petition of intervention in this cause. The motion is a renewal of one previously made, in reference to which the court in an opinion delivered on November 12, 1912, carefully stated its views, the repetition of which in detail seems to be unnecessary. However, the court's opinion then was and is now that claims such as that of the petitioner can have no basis unless and until it is ascertained in this action that the ordinance of the City of Louisville attacked by the complainant is valid. If the ordinance is invalid and confiscatory, A. Englehard & Sons Co. will have no claim, inasmuch as the rates charged by the Telephone Company will, in that event,

have been valid and collectable. The vital question involved in this litigation, and which must be first determined, is as to the validity of the ordinance rates, and that question is being valiantly fought out in this suit between the Telephone Company and the City of Louisville, the latter being capable of defending and entitled to defend the interest of her citizenship under the ordinance enacted by her. The presence of individual citizens, therefore, is altogether unnecessary in the contest between the parties to this action in their effort to secure a determination of the essential question involved. That question had once been settled so far as this court could then settle it. But for reasons stated in its opinion the Supreme Court said that it was not content to let that settlement stand, unless the ordinance rates were first put into effect, so as to have the actual results of the operation of the ordinance rates ascer-
80 tained. That is to say, the court held that there ought to be a settlement of that question upon actual figures rather than upon those which, to a certain extent, might be theoretical. Such a settlement will require a trial of those rates for a reasonable time—possibly for a year or two—and in the meantime the individual claimants of what they think are excesses in the rates charged them above those fixed by the ordinance must inevitably and necessarily wait until the essential problem is worked out by the actual trial and operation of the ordinance rates, that being the way fixed by the Supreme Court for ascertaining whether the latter are confiscatory. Until that has been done every right-thinking and fair-minded person will understand that it can not be known whether any excess rate has been charged. None will have been charged if the ordinance is finally held to be void on account of its alleged unconstitutional and confiscatory character.

It may be added that on the motion of the City of Louisville an order was entered on the 2nd day of November, 1912, appointing a special master to ascertain what, if any, rates the Telephone Company had charged between March 8, 1909, and July 1, 1912, in excess of the ordinance rates. Primarily, as we all know, this was done to ascertain the amount for which a bond should be exacted from the Telephone Company to make sure of the payment by it of the aggregate of such excesses as a basis for continuing in force or for granting an injunction restraining the collection of those excesses, pendente lite—a course which would protect the rights of all persons in interest pending the litigation and secure to them prompt payment of the excess, should the ordinance be ultimately upheld. It was and is hoped that the report of the special master may also be valuable and available for establishing the excess, if any, paid by each customer of the Telephone Company, though, of course, action upon this phase of the case must unavoidably and inevitably wait until the vital question of the validity of
81 the ordinance shall be finally settled. Hence, our idea, suggested in the former opinion, that we should not act on the motion to allow the intervention of individual customers of the Telephone Company until that Company and the City had carried the litigation to a point where we could at least see that it was probable that the customer had some interest which the City could

not protect as well as the customer could, and we thought the petition for intervention should be held in abeyance until then. The former petition would have been held in abeyance but for the insistence of petitioner's counsel that there should be a prompt decision of the motion. The motion was, however, overruled without prejudice to the right to renew it, and within that ruling the present application was doubtless made.

The views expressed in the former opinion were the result of very careful consideration. Speaking generally they remain unchanged. Nevertheless, it may now be well to deal with the matter in some detail from a different standpoint.

Obviously the City was the proper party to be sued in this action. Indeed, upon perfectly well established principles, it was the only proper party to defend, in its corporate capacity, the ordinance which, in that capacity, it had enacted. The City acts for the entire community in all municipal matters, and one who sues the city is neither required nor permitted to make each and every citizen a party to the action. This rule is established upon principles of common sense. A contrary rule would be intolerably burdensome as well as absurd. Hence the City—the Municipal Corporation—under the law of its organization is authorized to sue or be sued alone in respect to all municipal rights or obligations. These observations apply to this case the dominant question in which is whether an ordinance enacted by the City is valid. Its validity has been attacked, and resistance to that attack rests with the City

82 alone through counsel of her own selection, and, of course, the city, even in addition to her Law Department, may, under any duly enacted ordinance, retain any and every attorney she desires to entrust with the conduct of that defense. The court can exercise no possible control over her choice of advocates, and certainly it would be most unbecoming, not to say somewhat indecent, for this court for a moment to assume that her counsel, whoever they may be, will not adequately serve her interests. The question indicated is altogether the controlling question involved in this suit, but when, if ever, that question is decided in the city's favor, then there may be other resultant questions to be decided as between the complainant Telephone Company and its very numerous subscribers, or, as we shall call them, its customers. But these matters must necessarily be entirely incidental and subordinate to the principal question which must be fought out between the complainant and the City. If the litigation of that question shall finally result in a judicial determination that the ordinance is valid, then it will inevitably and somewhat automatically follow that each customer of the Telephone Company in this city who, between March 8, 1909, and July 1, 1912, paid to the Company more than the rates prescribed by the ordinance will be entitled to a refund of the excess. The amount of such excess paid by each individual customer must, in some way, be ascertained at some time, and the court has conceived that it was well to do this at as small cost to the customer as practicable, and has acted upon the idea that it would be well to do it through the work of the Special Master now in

progress, and the time has arrived when it may be proper to admit the intervention of such individual customers as may desire to come in, in order to be ready to see whether any excess rates paid by them has been accurately calculated by the Special Master. If the ordinance in contest shall finally be held valid, the two factors in the calculation as to each customer will be, 1st, the rate and amount actually paid by the customer, and, 2nd, the rate and amount prescribed by the ordinance. If these factors be accurately
83 found the result will be inevitable, because it will be the difference between them. Each calculation is not only extremely simple but is entirely individual—one of them in no way depending upon another.

The work of the Special Master so far has been to ascertain as a working basis the state of each customer's account on complainant's books. This was essential, not only for fixing the amount of the bond to be given by the Company, but also for the purposes to which this opinion relates. This working basis obtained, it has been and is the intention of the court to require that a preliminary and tentative statement (usually called a trial report) shall be made up clearly and accurately showing how the account of each of complainant's customers stands on its books for the period indicated, together with calculations as to the difference between the Company's rates and those fixed by the ordinance, and to have that trial report left open in the Special Master's office for public inspection for a length of time abundantly sufficient for each customer to see it and for each to point out errors, if any, therein so far as they pertain to his account. Ample time can easily be allowed for this, because, under the mandate of the Supreme Court, we must consume a considerable period in ascertaining whether the operations of the ordinance will yield to complainant a fair and reasonable return upon its property used by the public. The things indicated can be done before the report of the Special Master is finally settled or filed, and while complying with the spirit of Equity Rule 66, will afford an opportunity to avoid such costs as will come from the necessity of paying clerk's fees upon an intervention of record, besides a fee of $5.00 upon each exception decided as provided by Equity Rule 67. And that each customer may, for the period indicated, have an intelligent and accurate idea of how his account stands on the Company's books (which he could scarcely otherwise obtain) and thus be afforded an opportunity to correct any error which he might think was material, the court has
84 given much attention to the question of a proper plan to give each customer information of the status of his account, so that he might by reference to his own books, papers and receipts at once see whether the amount of any excessive rates charged and collected from him was accurately shown on the Special Master's trial report. For best accomplishing this result several plans have been considered, and that one will probably be adopted which will require the Special Master to send through the mail to each customer a statement, covering the period from March 8, 1909, to July 1, 1912, of the condition of his account, with an

invitation to him, if he sees any error therein, to present to the Special Master a statement in writing indicating the error. Any complaint of that or any other character can be heard by the Special Master at a minimum of trouble and expense.

In this very unusual case the condition of many thousands of individual accounts has to be ascertained by the Special Master, and the charges made and amounts collected have to be set down in comparison with the ordinance rates as to each customer and the difference stated. This enormous number of calculations necessarily requires great and tedious labor and much time. More of both will be required to notify the customers upon the plan outlined, but it has been and is the desire and purpose of the court to see that each claimant, when the matter becomes ripe for it, shall be given the fullest opportunity, without needless expense, to correct any mistake in the Special Master's figures, and we much incline to think that the plan indicated will best promote those ends. If in its contest with the Telephone Company the City shall maintain the validity of the ordinance no expense incident to the work of the Special Master will be chargeable to the customers of the Company, though (we may say by way of illustration) that it is conceivable, if others are permitted to take charge of the City's litigation, that those others may make claim to an allowance for their services out of whatever sums may then be coming to customers as overcharges, and especially may this be so if those others can then plausibly claim that their work and not that of the City created a special fund for the benefit of a class. Of course the right, if any, of a customer to have overcharges refunded will, in fact, as we have seen, result automatically and at once from the City's victory alone. The right to a return of the overcharges being entirely dependent upon such victory such right can not exist without it, and until that victory is achieved the customer, of course, must wait.

85

Furthermore, it is quite manifest that the interest of each customer of the complainant is altogether separate from that of every other customer, the right of no one of them being in any wise dependent upon that of the other. Each claim for a refund of overcharges will, therefore, be individual, and each must be figured as a separate problem. Of this character is the interest of A. Engelhard & Sons Company, and its motion for leave to file its bill of intervention will be sustained to the end that it may in due course set up herein any claim it may be entitled to make for the refunding to it of any amount it, as one of complainant's customers, may have paid to it for the use of its telephone system and service in the City of Louisville for the period between March 8, 1909, and July 1, 1912, over and above the rates for such service prescribed by the ordinance set forth in the bill of complaint. And as the question of the validity of that ordinance manifestly is the one of "common or general interest" in this litigation, and as the contest over that question will, as we must assume, be adequately attended to by the City (which is dominis litis as to its defense), and as all claims for the refunding of excess rates (if such contingent claims shall

ultimately mature) must necessarily be altogether individual in character, in view of what we have said, no reason has been made to appear why A. Engelhard & Sons Company should at present be allowed to act for a "class" under Equity Rule 38, though if that corporation shall hereafter present to the court satisfactory evidence that it is authorized to act for other named customers, then
86 an appropriate order can be made to apply to that situation and thus can be made certain the persons liable to contribute to the costs or expenses incurred by said A. Engelhard & Sons Company in this action.

Upon the deposit of a sum sufficient to cover its probable costs as required by the rules the motion of said A. Engelhard & Sons Company for leave to file the bill of intervention heretofore tendered will be sustained, said corporation will be admitted as a defendant herein for the purpose of enabling it to assert and maintain its claim to any overcharges of rates, and if it so elects its bill of intervention, so far as it is applicable and appropriate to that end, may be taken as its claim to a refund of any overcharges collected from it for its use of complainant's telephone service within said period, subject to complainant's right to move to require it to be made more definite and certain in its averments, or if so advised it may replead and thereafter in either event it may proceed in respect to said claim in all proper ways. But so far as said bill of intervention seeks the leave of the court for said corporation to represent any other person than itself, it is disallowed, and only said corporation may be made a defendant herein at this time, but whenever it shall be made to appear to the court in any appropriate way that other specifically-named claimants of such overcharges desire the said A. Engelhard & Sons Company to act for them herein, the latter shall be at liberty to apply for leave to do so. Of course all claimants of overcharges have the right to look after their claims, and will be given the amplest opportunity for so doing in person or by counsel and either jointly or severally, though the questions as to the individual claims must necessarily await the final determination of the principal contest between the City and the Telephone Company.

Orders accordingly will be entered.

WALTER EVANS, *Judge*.

87 *Order Directing Proceedings for the Carrying into Effect of the Mandate of the Supreme Court.*

The question of the proper proceedings to be taken in this cause for carrying into effect the mandate and judgment of the Supreme Court which has frequently been argued by counsel both formally and informally, and certain objections in writing of the defendant being now filed, and the court being now sufficiently advised alike upon the general question and upon said objections, delivered its opinion in writing, which is ordered to be filed and made part of the record, and pursuant thereto it is ordered, adjudged and decreed as follows, namely, first, that each and every of the said objections

should be and each is overruled; second, that it appears and has been shown that special reasons exist for a further reference of this action to a master; and third, that the court now determines that special reasons exist therefor, namely, the character of the work to be done and the special capacity and fitness of A. G. Ronald, Esq., Clerk of this Court, for said work, and it appearing from the record in this cause and the order made and entered herein on November 2nd, 1912, that said A. G. Ronald has already been appointed special master herein to perform the duties imposed upon him and set forth in the said order, and that he is now engaged in the active work required by said order, for the reasons hereinbefore stated it is now further ordered, adjudged and decreed that the powers and duties of said special master be and they are enlarged, and that he be and he is, in addition to the duties already fixed by the former order, ordered and directed to inquire into and report (*a*)

88 whether on or about July 1, 1912, or at any later date, the complainant put into operation the rates for telephone service in the city of Louisville prescribed by said city in the ordinance approved March 6, 1909, fixing the rates to be charged by the complainant in said city, and which ordinance is more especially described in the bill of complaint in this action; (*b*) if the rates put into force by the complainant on or about July 1, 1912, differ from those fixed by said ordinance he will ascertain and report what that difference is and to what it extends, and (*c*) he is also directed to ascertain and report the gross earnings of the complainant derived from its property in this city which is devoted to the uses within the city of the public therein, also the gross expenses properly incurred by the complainant in operating the said property in this city for telephone service therein, and also the net income of the complainant derived from the operations of its telephone system within the city of Louisville beginning with July 1, 1912. The said special master is also directed to report as promptly as may be the results of such inquiries for the period between July 1, 1912, and March 1, 1913, and thereafter he will from time to time report upon the same matters for periods of four months each, the first of said periods to begin with March 1, 1913. He is also directed to ascertain and report the total number of subscribers to complainant's telephone in said city on the 1st day of July, 1911, on the 1st day of July, 1912, and on the 1st day of July, 1913.

89 The opinion above referred to is as follows:

Opinion on the Question of the Proper Proceedings to be Taken for Carrying into Effect the Mandate of the Supreme Court.

So that we may fully understand the exact situation to be dealt with, it may be well to state with some detail the facts bearing upon the question of the proper proceedings to be taken for carrying into effect the mandate of the Supreme Court in this case, and at the same time recall what has already been done in that direction.

The object of all judicial proceedings is the achievement of just

and lawful results therein, but this can only be done by industriously and impartially considering the questions involved to the end that correct conclusions may be reached.

In order to accomplish his task the judge must spare no labor, and so far as the Great Judge of all things has given him the capacity to see it he must patiently and steadfastly pursue his course of duty, nor be swerved from it by the least fear nor the slightest favor. This is the exalted duty of him who has sworn, to the best of his liability, to administer justice. He is called upon to do this between such of his fellowmen as may engage in litigation of a more or less acrimonious character, in which, being themselves partisans, they will probably not be able to be impartial or unselfish.

In this case many individuals may ultimately have an interest, though fortunately the interest of each, if it shall turn out to be anything, will not be large, the average probably not exceeding fifteen dollars. It seems likely that those whose claims are less than that sum will greatly exceed in number those whose claims
90 will be more. Nevertheless the smallest claim will be entitled to receive and will receive as careful consideration as if it were larger, but of necessity and because of the directions of the Supreme Court all must wait for the ascertainment of the facts upon which their right to anything depends.

When in June last the opinion of the Supreme Court was received it was found to be very brief, and to have ruled upon very few if indeed it ruled upon more than two of the questions involved in the litigation. All that is found in the opinion which is of present importance is contained in two extracts therefrom which will be presently set forth. Upon reading the opinion alone there was doubt as to what the Supreme Court intended, but when what we shall copy from the opinion came to be construed in connection with the mandate there was nothing delphic about it. The mandate, however, had been sent to the City Attorney, who did not bring it to the attention of the court until he tendered and filed it on September 28th, 1912. After showing the reversal of the judgment of this court, the mandate expressed the direction of the Supreme Court in this language:

"And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Kentucky for further proceedings not inconsistent with the opinion of this court."

Upon reading that direction this court, on September 28th, entered its own order as follows:

"And, pursuant thereto, it is ordered, adjudged and decreed by this court that the decree entered by the Circuit Court of the United States for the Western District of Kentucky on the 25th day of April, A. D. 1911, in this cause be, and the same is hereby, set aside; and that the cause be, and it is, restored to the docket of this court for further proceedings not inconsistent with the said opinion of the Supreme Court."

With the opinion of the court and the mandate which explains it before us it does not seem difficult to understand what the Su-

preme Court intended should be done. Nevertheless there was much argument about it, after hearing which the court, according to its promise announced in open court in October last, transmitted
91 by mail to the counsel for the respective sides a memorandum of the conclusions it was inclined to adopt. In that memorandum the court said:

"The court has given much thought to the condition and requirements of this case since its decree was reversed by the Supreme Court. In its opinion the court seems to put the reversal solely upon the ground that in the two respects it points out this court and its special master differed in their figures upon the valuation of the complainant's plant and upon the net earnings the company would probably realize for services rendered the public under the rates prescribed by the ordinance enacted by the city and complained of by the Telephone Company. The mere fact that those differences appeared seems, per se, to have satisfied the court without any further investigation that it had not been made clear by the complainant that the ordinance rates attacked in its bill were confiscatory. We say this seems to be so because, while confining itself to a statement that the differences in the respects indicated existed and what those differences were, and after stating some of the figures set forth in the very laboriously prepared opinion in which we endeavored to make clear their perfect accuracy, the Supreme Court said, first, that the figures referred to 'leave us unprepared to sustain the decree without giving the ordinance a trial to show its actual effect,' and second, 'But when it is remembered what clear evidence the Court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent. on the values estimated by him. The Judge on assumptions to which we have stated our disagreement makes the present earnings 5 10 17 per cent. with a reduction by the ordinance to 3 6 17 per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand.'

* * * * * * *

The Supreme Court did not regard it as necessary for our guidance in the future to indicate whether either one of the four items constituting the essential differences between the Court's valuation and that of the Master should properly be included in the estimate of the property devoted to the use of the public, and upon which the complainant would be entitled to a fair return. Nor did the Supreme Court give us any guidance as to how we should estimate net earnings, though probably we can find the rule in the Wilcox and Knoxville cases.

When the mandate came down it directed this court to proceed in accordance with the opinion of the Supreme Court. While the opinion refrains from shedding any light for our guidance in the future progress of the case upon the other vital questions involved,

and while certainly not saying that the figures of this court as set down in its opinion were wrong, we must conclude that the ordinance rates should be put into effect by this court under the principles laid down in Knoxville vs. Water Co., 212 U. S. 1, and Wilcox vs. Consolidated Gas Co., 212 U. S. 19, in order to test by actual operation whether the ordinance rates when enforced fairly and under the constant inspection and scrutiny of the court would bring a just and fair return upon the complainant's property used by the public. The Supreme Court evidently meant that nothing short of subjecting the rates to that test would satisfy it or should be satisfactory to this court. We do not think the Supreme Court meant that the Telephone Company for the purposes of this suit might itself put the ordinance rates into effect and itself say how that should be done. It was intended that the court should do
92 these things and thus for itself ascertain whether the ordinance rates were confiscatory. It has occurred to us that if this be done, and if a special master should superintend it and report to us in every period say, of three or four months, and if those reports should be open to exceptions and settlement by the court, and if for every such period the exact earnings should be accurately ascertained, we could in four or five or probably less of such periods ascertain definitely and clearly the character of the ordinance rates, and whether or not they were confiscatory. If after a full and fair trial they were ascertained to be reasonable and just the bill would have to be dismissed. But if after such trial they were found to be confiscatory the relief prayed for would be granted, and the enforcement of the ordinance complained of would be perpetually enjoined."

A few days afterwards the court, in a further memorandum of its views delivered to counsel on the respective sides in the same way, said:

"In a somewhat informal colloquy concerning this case had on Saturday the proposition was mooted, and indeed argued, that the mandate of the Supreme Court required that the action should be dismissed without prejudice. It is important, if this be true, that we should at once ascertain it and act accordingly. It did not seem to the court on September 28th, when the mandate was filed, that this was the proper view of it, and so, instead of dismissing the action, it was ordered to be restored to the docket for further proceeding not inconsistent with the opinion of the Supreme Court. This literally followed the language of the mandate. No motion is now made to change that order, but it may be well to examine the question, as, if the Supreme Court ordered a dismissal, the order must be at once obeyed.

In substance, the Supreme Court in its opinion said that, in the absence of that clear proof which it always required before holding that prescribed rates are confiscatory, it did not feel authorized to let the injunction stand, and it was unprepared to sustain the decree granting the injunction without giving the ordinance a trial to show its actual effect and closed with the words, 'Decree reversed without prejudice.' The clerk of that court issued the mandate in the language embraced in our order of the 28th of September.

While, as stated, no motion to correct or set aside our order ha
been made, nevertheless as we are all endeavoring to ascertain pre
cisely what is the proper course to be pursued as we start off anew i
the case, it may be well to state our view of the meaning in this con
nection of the opinion and mandate of the Supreme Court. It i
argued by the learned City Attorney that they mean precisely wha
was meant in the Court's mandate in Knoxville vs. Water Co., 21
U. S., where, on page 19, it was expressed as follows: 'The decree i
reversed with directions to dismiss the bill without prejudice,' and
in the court's mandate in Willcox vs. Consolidated Gas Co., 212
U. S., where, on page 55, is this language: 'To that end we reverse
the decree with directions to dismiss the bill without prejudice, and
it is so ordered.' In our case the mandate (which is nothing more
or less than the Court's order in the case), after showing that the
judgment of the court below was 'reversed without prejudice,' pro
ceeds as follows: 'And it is further ordered that this cause be, and
the same is hereby, remanded to the District Court of the United
States for the Western District of Kentucky for further proceedings
not inconsistent with the opinion of this court.' By bringing the
language of the mandates in the three cases in close collec-
93 tion and comparing it the difference becomes entirely obvi-
ous. It will be seen that in the cases reported in 212 U. S.
the judgment was reversed and the case was remanded 'with direc
tions to dismiss the bill without prejudice,' while in our case there
plainly is no direction to dismiss the bill at all, but the cause is re
manded 'for further proceedings not inconsistent with the opinion
of this Court,' that opinion being that there should be an actual trial
of the rates.

There can be no misunderstanding of the language or the purpose
of the Court in the two cases we have cited from 212 U. S. In each
of them the Court explicitly directed the dismissal of the bill without
prejudice, while in our case the explicit direction is for 'further pro
ceedings' not inconsistent with the opinion. We think this makes
the difference so clear that no one need fail to see it, although we
may not be able to see the precise purpose the Court had in its use
of the words 'reversed without prejudice.' Whatever the meaning
of the words 'reversed without prejudice,' it is apparent that it does
not mean a direction to 'dismiss' the bill without prejudice. We are
not in the slightest degree at liberty to change or modify the direc
tions of the Supreme Court, nor do we conceive it to be possible that
we can interpolate in its mandate the words 'with directions to dis
miss the bill without prejudice,' or with those words to supplant those
actually used in the mandate directing 'further proceedings' not in
consistent with the opinion.

It is not for a lower court to speculate as to any meaning of an
appellate tribunal outside what it says. We must follow literally
what is directed, remembering that it knows exactly how to express
itself. Certainly the Court gave clear expression to its intention in
the two cases in 212 U. S. If it had desired to make similar direc
tions in our case nobody *every* knew better how to say so. But it
did not direct us to 'dismiss' the bill in any way. On the contrary,

it plainly directed us to proceed further in a way not inconsistent with its opinion.

Besides, we can not doubt that the Supreme Court realized the convenience and justice of proceeding in this case to put the rates complained of into actual effect so as to give them a practical test and thus ascertain whether they were confiscatory, rather than to require a new suit."

This was all done in the course of very careful consideration, with the assistance of counsel, of what should be done in a somewhat complex and certainly in a very unusual situation. No definite conclusion, however, was reached, nor was any order in the premises made. Several reasons contributed to this. Among them were first, it would certainly take a year or more to give the ordinance rates a reasonable and fair test and trial, and this made it unnecessary that there should be any special hurry; second, many other matters of great importance claimed the court's time and attention, such as jury terms at Louisville, at Paducah and at Owensboro; third, by the time these labors were completed there had come a change in the city administration early in December, which brought into office a new City Attorney, who of course needed time to familiarize
91 himself with the routine work thereof as well as with the details of this case, and fourth, it had been conceded by both sides when the order of November 2nd, 1912, was entered, that the ordinance rates — had been put into effect by the Telephone Company were approximately those fixed by the ordinance, and thus every customer was known to be now getting the benefit of the low rates.

But after the delays indicated neither of the parties to this suit moved nor did either take any steps to the desired end, and the court itself, thinking it time to do so, on its own motion and in order that the actual putting into force of the ordinance rates might be under the control and approval of the court, the Judge sent to counsel a letter couched in the following terms:

"LOUISVILLE, KY., *Feb.* 8, 1913.

Cumberland Telephone Company vs. City of Louisville.

Judge A. P. Humphrey, Counsel for Complainant, and Hon. Pendleton C. Beckley, City Attorney.

DEAR SIRS: I should be glad to see counsel in my office at 10 A. M. Wednesday next, the 12th inst., for the purpose of fixing a convenient time for considering a question of further directions under the mandate of the Supreme Court in the above-styled case.

Very respectfully,

WALTER EVANS."

As will be seen from this note the invitation to counsel was "for the purpose of fixing a convenient time for considering a question of further directions," &c. Not on February 12th, but a few days later, which best suited the convenience of counsel, both of them

came to the Judge's office, and very soon entered upon a discussion not of the "time" for considering the question but of the question itself. Especially did the City Attorney come prepared for this discussion, and in his argument cited divers cases, and upon them urged contentions precisely like those previously presented by his predecessor. The principal of these contentions was that the Supreme Court intended to direct the dismissal of the complainant's suit without prejudice, and therefore that any further directions were inadmissible. In doing so he was probably not aware that
95 long ago the court, in the memoranda from which we have made extracts, expressed itself very carefully upon that phase of the case. Nor probably was he aware that in the course of the previous arguments the court, while stating generally its views to that effect, had suggested in open court that the Judge would welcome an application by the city to the Supreme Court for a mandamus to compel him to so dismiss the action, for in that event the Supreme Court could itself definitely construe its own directions. Nor probably was the City Attorney aware that this course was inconsistent with the view of his predecessor that the proper course for this court to pursue was not to dismiss the suit for all purposes but to do so for some purposes, and to retain it for others, namely for that of collecting the excess rates during the 40 months the injunction pendente lite was in force—a complication of directions which it would be impossible to find in the mandate.

But apart from these matters, the Judge, at the conference referred to, as both sides were present, heard all they had to say for nearly an hour. A few days later Judge Humphrey felt impelled to state to the court that he had acquiesced in the course taken because, before coming to the Judge's office, the City Attorney had expressed to him his preference that the question should be discussed in chambers. There could be no valid objection to that course, inasmuch as both sides were present. This preference was in no way explained to the Judge nor was it necessary to do it, because, under Equity Rule No. 1 recently promulgated, as both sides were present, it was entirely proper for the matter to be disposed of in chambers, whatever that word may mean. While much work is done in "chambers" in other districts, not enough of it is done that way here for us to feel confident that we understand clearly what the technical significance of the word is.

Exceptional conditions seeming to require a reference, the Judge announced his view to be that one of the things best to be done in order to carry the mandate into effect was to enlarge the scope of the directions to A. G. Ronald, the special master, under the
96 order of November 2nd, 1912, appointing him and directing him, very generally speaking, to ascertain the names of the customers of the Telephone Company, the rates charged them by the Company, the amount each customer had paid between March 8th, 1909, and July 1st, 1912, so as to show the excess each had paid over and above the rates fixed by the ordinance attacked in this litigation. Such enlargement of the special master's duties would organize the forces by which the order of the Supreme Court

could be carried into effect under the explicit directions and knowledge of the court through its officer, and would at the same time save some of the cost of a second special master, which of course was desirable.

The Judge invited the respective counsel to suggest in writing his views as to what should be the form and provisions of an order enlarging the powers of the special master.

Judge A. P. Humphrey, counsel for complainant, made no objection to the enlargement of the powers of the special master, and afterwards sent in his suggestion as to what the order should contain, in the following language:

"It is now ordered that the order heretofore entered, referring this case to A. G. Ronald as Special Commissioner, be and it is hereby enlarged by directing the said Commissioner to ascertain and report to the Court whether the complainant, the Cumberland Telephone & Telegraph Company, has put into effect the rates prescribed by the ordinance of the City of Louisville in controversy herein, and, if so, at what time.

The Commissioner will report the facts in reference to this matter to the end that the Court may determine whether there has been such action upon the part of the complainant in reference to putting into effect said ordinance rates as can be adopted by the Court in obedience to the mandate of the Supreme Court of the United States.

The Commissioner will also report whether the Cumberland Telephone & Telegraph Company, since the time it put said rates into effect, has kept account of its earnings and expenses based on said ordinance rates."

The City Attorney had urged certain objections to any order, but made no suggestion as to the form the order should take if one were made. His objections were afterwards reduced to writing, and are as follows:

"The defendant, City of Louisville, objects to the entry of an order enlarging the order heretofore entered by directing the said Commissioner to ascertain and report to the Court whether the complainant, The Cumberland Telephone & Telegraph Company, has put into effect the rates prescribed by the ordinance of the City
97 of Louisville in controversy herein, and if so at what time; and directing the Commissioner to report the facts in reference to this matter to the end that the court may determine whether there has been such action upon the part of the complainant in reference to putting into effect said ordinance rates as can be adopted by the Court; and directing the Commissioner to report whether the Cumberland Telephone & Telegraph Company, since the time it put said rates into effect, has kept account of its earnings and expenses based on said ordinance rates, for the following reasons:

1st. In the order of reference entered November 2nd, 1912, the Special Master is directed 'to take proof and report the amount with interest collected by the complainant from its subscribers in Louisville, Kentucky, in excess of the rates fixed in the ordinance complained of in the bill, between the time of the temporary injunction pendente lite went into effect, namely, on March 8th, 1909, and

July 1st, 1912, at which latter date counsel agree that the ordinance rates were put into effect by the complainant.'

2nd. Under the mandate of the Supreme Court of the United States filed in this case this Court is not directed to put into effect the rates prescribed by the ordinance of the City of Louisville of March 6, 1909.

3rd. The District Court of the United States for the Western District of Kentucky is without jurisdiction to enforce the ordinance in controversy in this case and there is no pleading in this case which would justify the District Court in either enforcing or attempting to enforce said ordinance.

4th. It is the contention of the defendant, City of Louisville, that the only matter involved in the case at bar is the collection from the complainant and the distribution to those entitled thereto of all sums collected by the complainant for telephone service in excess of the rates fixed by the ordinance of March 6, 1909, from the date of the approval of said ordinance to July 1, 1912, when these rates were put into effect by the complainant as shown by the order of reference heretofore entered.

5th. That the defendant, City of Louisville, has heretofore objected to the appointment of Mr. Ronald, Clerk of the Court, as Special Master in this case for the purposes of carrying out the provisions of the order of reference, and now objects to any enlargement conferring any additional power upon said A. G. Ronald as Special Master."

In substance all these objections had long before been argued and the court had denied them any force upon grounds fully considered and stated at the time. There was no merit in mere repetition of them because if the court's rulings thereon were erroneous the error inhered in the record, and could at the proper time be reviewed by an appellate court.

The learned City Attorney in the last of the objections just copied stated all the objections he had to Mr. Ronald's appointment. Obviously they were no objections at all. He did not for a moment urge, and said that he had no desire to urge, any objections to Mr. Ronald personally. There was indeed no reason why Mr.
98 Ronald could not and would not perform the additional duties suggested in the most fair, conscientious and proper manner, and the Judge made no concealment of his purpose to overrule the objections to the enlargement of his duties, which possibly might be regarded in some sense as a new appointment. Because of that aspect of the case the court, while overruling the objections, will again determine that Mr. Ronald is specially well fitted for the work. He is a lawyer of large experience and excellent ability. He had, before his appointment as Clerk served as special master of the court in very important cases, and while the court has only twice appointed him as special master since his appointment as Clerk, over eight years ago, it was not because he was not admirably fitted for the work, but because the court intended to use sparingly its power to appoint the Clerk unless the case came within the spirit as well as within the letter of Section 68 of the Judicial Code and previous statutes of like character.

As indicated, the City Attorney has made no suggestions as to the form of an order suitable to the situation, though the counsel for the complainant has done so. The form suggested by the latter does not seem to us to be broad enough. We think the opinion and mandate of the Supreme Court require that this court must itself see that the ordinance rates are put into actual operation in the fullest and most exact manner. It is said that this was done on July 1st, 1912, and that no change from that course has been made. This may be true, but we have only the word of the Company for it, supplemented by a general acquiescence in the statement by the former City Attorney. The court can not in person see to these matters because of other exacting labors, but it can ascertain the facts through its special master. The work should be done by beginning at July 1st. Besides, we must ascertain the amount of the net earnings of the complainant not only for the period beginning July 1st last and ending at this date, but also for such further period as may be necessary to fully and satisfactorily test the ques-
99 tion whether the ordinance rates are confiscatory. These are the factors in the problem which must be solved by the final decree. We think it will aid us in the task if we definitely ascertain from time to time how the work is progressing, and thus keep fully in touch with it. We think also that it may be helpful for him to ascertain the number of complainant's customers in this city at certain dates, say July 1, 1911, July 1, 1912, and July 1, 1913. When the facts in respect to these matters are in this way established, they, in connection with what the record already shows, may be all that the Supreme Court regards as necessary.

To carry these purposes into effect we have drawn an order which will be entered.

WALTER EVANS, *Judge*.

100 And, on another day of said term of Court, to-wit, March 29th, 1913, the following proceedings were had:

Order.

This day came the defendant, City of Louisville, by Pendleton Beckley, J. W. S. Clements, and Stuart Chevalier, its counsel, and presented to the Court its petition for an appeal and assignment of errors, and upon consideration thereof, it is now ordered that said petition and assignment of errors be filed and an appeal be and is hereby allowed to have reviewed in the Supreme Court of United States the order and proceedings heretofore had herein, upon the defendant giving bond according to law in the sum of Five Hundred ($500.00) Dollars, said bond not to operate as a supersedeas.

The assignment of errors above referred to is as follows:

101

Assignment of Errors.

And now, on this 29th day of March, 1913, comes the defendant, City of Louisville, by its Solicitors, Pendleton Beckley, J. W. S. Clem-

cuits and Stuart Chevalier, and says that the order and decree entered and rendered in the above cause on the 10th day of March, A. D. 1913, is erroneous and unjust to the said defendant, and assigns errors thereto as follows:

1. The Court misconstrued the Opinion of the Supreme Court of the United States in this cause, and erred in holding that the Supreme Court by its said Opinion directed the District Court to put into effect the rates fixed by the City of Louisville in its ordinance of March 6, 1909, and supervise the operation of the complainant's telephone plant in Louisville, Kentucky, and determine from such supervision whether the rates fixed by such ordinance were or were not confiscatory.

2. The Court erred in appointing on its own motion, and without any request being made therefor on the part of complainant or defendant, a Special Master to supervise the operation of the said complainant's telephone plant in the City of Louisville for the purpose of ascertaining whether the said ordinance rates were or were not confiscatory; and erred in interpreting and construing the Opinion of the Supreme Court to mean that said District Court
should appoint such Master and so supervise the operation of
102 the complainant's telephone plant, or ascertain any facts in regard to its expenses or income.

3. The Court erred in construing and interpreting the Opinion of the Supreme Court in the above styled cause to mean that the District Court was thereby directed to put into effect or enforce the rate ordinance of the City of Louisville of March 6, 1909.

4. The Court erred by its said order in directing the Special Master to ascertain whether the complainant had put into operation the telephone rates prescribed by the ordinance of March 6, 1909.

5. The Court erred in directing the Special Master to ascertain and report the gross earnings, the gross expenses and the net income of the complainant from operating its telephone system in the City of Louisville.

6. The Court erred in holding that the Supreme Court decided nothing in its Opinion but that the injunction should not be allowed to stand until the rates fixed in said ordinance of March 6, 1909, had been given a trial, and in holding that the Supreme Court further meant by its Opinion that the District Court should see that said rates were put into effect and given a trial.

7. The Court erred in holding that it had jurisdiction to enforce the rate ordinance of the City of Louisville of March 6, 1909.

8. The Court erred in appointing A. G. Ronald, Esquire, Clerk of said District Court, as Special Master in the above styled cause, it not appearing that any special reason or reasons existed therefor, and no such special reason being assigned in the order of appointment, and it further appearing that the defendant at the time objected to such appointment.

9. The Court erred in removing Henry Burnett, Esquire, former Special Master in the above styled cause, no reason being assigned therefor and no reason existing for such removal.

10. The Court erred in failing and refusing to find and
103 hold that by the Opinion and Mandate of the Supreme Court in the above styled cause, said Court intended that said cause was at an end, except for the purpose only of requiring the complainant to make restitution of any sums it had unlawfully collected from its patrons by reason and by virtue of, and under the protection of the temporary restraining order which had been granted by said Court on March 8, 1909.

11. The Court erred in refusing to sustain the defendant's motion to require the complainant to pay into court, for immediate distribution among those entitled thereto, whatever sums the complainant was found to have unlawfully collected from its patrons by virtue and under the protection of the said temporary restraining order of March 8, 1909.

12. The Court erred in holding that the sums collected by the said complainant from its said patrons in excess of the rates fixed in the ordinance of March 6, 1909, by virtue and under the protection of said temporary injunction of March 8, 1909, should not be paid into Court for immediate distribution among those entitled thereto, but that a bond should be required of the complainant for the restitution of such amounts when said rate ordinance of March 6, 1909, should, on another trial, be declared to be not confiscatory as to complainant.

13. The Court erred in holding that the complainant should not be required to make restitution to its patrons for the amounts collected by it in excess of the rates fixed in the ordinance of March 6, 1909, unless said ordinance of March 6, 1909, was, on another trial, declared to be not confiscatory as to the complainant.

14. The Court erred in retaining jurisdiction of the case for the purpose of testing the validity of said ordinance after the Mandate of the Supreme Court was filed.

15. The Court erred in holding that the validity of the ordinance of March 6, 1909, could be further tested in this action, the prayer for an injunction having been finally denied by the
104 Supreme Court of the United States on appeal and no other affirmative relief having been sought by complainant in this present case.

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Solicitors for the City of Louisville.

105 The bond above referred to is as follows:

106 District Court of the United States, Western District of Kentucky.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
vs.
CITY OF LOUISVILLE.

Know all men by these presents, that we, City of Louisville, Kentucky, Principal and Fidelity & Deposit Company of Maryland are

held and firmly bound unto Cumberland Telephone & Telegraph Company in the sum of Five Hundred Dollars, to be paid to the said Cumberland Telephone & Telegraph Company executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 3rd day of April A. D. 1913.

Whereas, The above named City of Louisville, Kentucky, hath prosecuted its — to the Supreme Court of the United States to reverse the orders rendered in the above entitled suit, by the District Court of the United States for the Western District of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named City of Louisville, Kentucky, shall prosecute its said appeal to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, KENTUCKY. [L. S.]
By PENDLETON BECKLEY, *Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND. [L. S.]
By EDW. J. WATKINS, *Atty in Fact.* [L. S.]

Sealed and delivered in presence of
HENRY F. CASSIN,
Deputy Clerk U. S. Court.

Approved April 3d. 1913.

WALTER EVANS, *Judge.*

107 And, on another day of said term of Court, to-wit, April 3rd. 1913, the Defendant filed with the Clerk of the District Court of United States for the Western District of Kentucky, the following Praecipe.

Praecipe.

A. G. Ronald, Esquire, Clerk of the District Court:

You are requested to prepare the record in the above styled action for appeal to the Supreme Court of the United States by copying all orders and papers filed herein from and including the order filing the mandate of the Supreme Court of the United States.

Yours respectfully,

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Solicitors for Defendant.

Service of Notice this day accepted. April 3rd. 1913.

ALEX. P. HUMPHREY,
For Cumberland Telephone & Telegraph Company.

108 I, A. G. Ronald, Clerk of the District Court of United States for the Western District of Kentucky, do hereby certify that the foregoing transcript containing 107 pages is a true and accurate copy of the entire record in the case of Cumberland Telephone & Telegraph Company vs. City of Louisville, Ky., No. 7194, In Equity, since the filing of the Mandate of the Supreme Court in said cause on the 28th day of September, 1912, copied in accordance with the instructions of counsel for the appellant given in the praecipe filed April 3rd, 1913, and copied herein, as the same appears from the original papers now on file in my said office.

Witness my hand and the seal of said Court this 26th day of April, 1913.

[SEAL.]

A. G. RONALD,
Clerk United States District Court,
Western District of Kentucky.

109 UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

To Cumberland Telephone & Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C., on the* 20th day of May next, pursuant to an appeal allowed by the District Court of the United States for the Western District of Kentucky, wherein City of Louisville, Kentucky, is appellant and you are appellee, to show cause, if any there be, why the orders rendered against the said appellee as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 26th day of April in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-seventh.

[SEAL.]

WALTER EVANS, *Judge.*

*Not exceeding 30 days from the day of signing.

Service of this is hereby accepted April 29, 1913.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
Per ALEX. POPE HUMPHREY.

Endorsed on cover: File No. 23,670. W. Kentucky D. C. U. S. Term No. 1095. City of Louisville, Kentucky, appellant, vs. Cumberland Telephone & Telegraph Company. Filed May 3d, 1913. File No. 23,670.

Office Supreme Court, U. S.
FILED.
OCT 14 1913
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 538.

CITY OF LOUISVILLE, KENTUCKY, *Appellant*,

v.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, *Appellee*.

MOTION TO ADVANCE AND CONSOLIDATE.

Comes the appellant and represents to the Court that the case of City of Louisville, Kentucky, v. Cumberland Telephone & Telegraph Company, being No. 538 on the docket for the October Term, 1913, is an appeal from the order of March 10, 1913, entered by the United States District Court for the Western District of Kentucky, in the case of Cumberland Telephone & Telegraph Company v. City of Louisville; that said order is the one complained of and sought to be vacated by the appellant in the mandamus proceedings now pending in this Court, being numbered 11 original on the docket for the October Term, 1913; that this appeal is a second appeal of this cause, the other appeal having been numbered 761 on the docket for the October Term, 1911, and having been already heard and determined on its merits. (See 225 U. S. 430.)

Your petitioner represents that this appeal was taken with a view to having the matters involved in this proceeding determined with the whole record before the Court; appellant assigns as an error that by the order in question the district judge misconstrued the opinion of this Court in the case of City of Louisville v. Cumberland Telephone & Telegraph Company, 225 U. S. 430; the district judge and master appointed by him under said order of March 10, 1913, were proceeding to execute the order appealed from notwithstanding the appeal, thereby entailing heavy expenses on the appellant; in view of which fact the appellant deemed it wise to ask this Court for the writ of mandamus prayed for in the petition above referred to; that this appeal involves the same questions involved in said mandamus proceedings.

Appellant now moves the Court for an order advancing this appeal, and for a further order directing same to be heard with the mandamus proceeding above referred to.

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Attorneys for the Appellant, City of Louisville, Kentucky.

Office Supreme Court, U. S.
FILED.
OCT 14 1913
CLERK

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 538.

CITY OF LOUISVILLE, KENTUCKY, *Appellant*,

v.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, *Appellee*.

NOTICE.

The appellee, Cumberland Telephone & Telegraph Company, and its counsel are hereby notified that the appellant in the above styled action will on October 13, 1913, or on the day following, when motions are called for in said Court, move said Court for an order advancing this cause and consolidating this cause with cause No. 11 Original on the docket for the October Term, 1913, styled In re City of Louisville, Kentucky, Petitioner.

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Attorneys for Appellant, City of Louisville, Kentucky.

Notice accepted:

HUNT CHIPLEY,
WM. L. GRANBERY,
ALEXR. POPE HUMPHREY,

CITY OF LOUISVILLE *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 538. Argued November 10, 1913.—Decided January 5, 1914.

Decided on authority of *In re Louisville, ante,* p. 639.

THE facts are stated in the opinion.

Mr. Pendleton Beckley, with whom *Mr. J. W. S. Clements* and *Mr. Stuart Chevalier* were on the brief, for appellant.

Mr. Alexander P. Humphrey and *Mr. W. L. Granbery,* with whom *Mr. Hunt Chipley* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from the order of March 10, 1913, referred to in Nos. 11 and 12, Original, and which order it was the object of the petition for mandamus passed on in No. 11 to command the Judge of the District Court to vacate. The appeal also includes certain other orders which preceded the making of that order. The question, which is fundamental of all, is whether the decision and decree of this court set out in No. 11, Original, and the mandate issued thereon permitted further proceedings in the suit or necessarily required its dismissal. This is the general basis of the assignments of error, and as included in it, special objection is made to the instructions given the master in the orders appealed from, to the refusal of the court to order the Telephone Company to pay into court for immediate distribution among those entitled thereto, whatever sums the company collected in excess of the ordinance rates, and deciding instead that a bond should be required of the company for the restitution of the amounts if the ordinance rates should ultimately be held not to be confiscatory. These objections are repeated in the usual way of assignments of error.

The discretion vested in the court, we considered in No. 11, Original, and repetition would serve no purpose. For the reasons there given the order of the District Court is

Affirmed.